TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 27

HEGEMAN FARMS CORPORATION, APPELLANT,

vs.

CHARLES H. BALDWIN, THOMAS PARRAN, JR., AND KENNETH F. FEE, AS MEMBERS OF THE MILK CONTROL BOARD OF THE STATE OF NEW YORK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED APRIL 25, 1934

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 4, 1934

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IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. E. 77—180

HEGEMAN FARMS CORPORATION, Plaintiff,

against

CHARLES H. BALDWIN, THOMAS PARRAN, JR., and KENNETH F. FEE, as Members of the Milk Control Board of the State of New York, Defendants

ORDER TO SHOW CAUSE

Upon reading the bill of complaint on file in the above entitled action, together with the affidavit of Benjamin Greenberg, and the motion of Rubinton & Coleman, solicitors for the complainant, for an order requiring the above named defendants, Charles H. Baldwin, Thomas Parran, Jr., and Kenneth F. Fee as members of the Milk Control Board of the State of New York, to show cause, if any they have, why they should not be enjoined and restrained during the pendency of this action and until the determination thereof from in any manner proceeding with the enforcement against complainant of the provisions of a certain statute known as Chapter 158 of the laws of 1933 of the laws of the State of New York, and from enforcing against complainant any orders made by defendants pursuant to the aforesaid statute; and that the complainant may have such other and further relief as to the court may seem just and equitable in the premises.

And it further appearing from the verified bill of complaint filed herein and the affidavit of Benjamin Greenberg, sworn to on the 26th day of January, 1934, that this is a proceeding to restrain the above named defendants, officers [fol. 4] of the State of New York, acting pursuant to the provisions of the aforesaid statute, Chapter 158 of the laws of 1933 of the laws of the State of New York in the enforcement and execution of such statute as against this complainant, and a temporary and interlocutory injunction being prayed for herein, and this motion being filed pur-

suant to the provisions of Secs. 380, 381, title 28, United States Code (Judicial Code Section 266, amended) for the issuance of a temporary restraining order upon the grounds set forth in the bill of complaint and affidavit of Benjamin Greenberg to prevent immediate, great and irreparable injury, loss and damage which would otherwise result to the complainant before the hearing and determination of the application for an interlocutory injunction herein may be had, or notice thereof be served, particularly because said complainant has been required by defendants to forfeit its license as milk dealer, or else to pay $23,000.00 before January 31, 1934, which $23,000.00 will be distributed by defendants to 450 milk producers, and said complainant further making this its application to this court for a hearing of this cause for an interlocutory injunction in accordance with Section 380, title 28 of the United States Code (Judicial Code Section 266, amended) before three judges, as provided in said Section 380, title 28, United States Code (Judicial Code Section 266, amended),

Now, therefore, the court being fully advised, it is

Ordered and adjudged, that the said defendants, be and appear before the court consisting of three judges as provided by Section 380, title 28, United States Code (Judicial Code Section 266, amended), on the 12th day of February, 1934, at the hour of 10:30 A. M. of the said day, or as soon [fol. 5] thereafter as counsel can be heard, then and there to show cause, if any they have, why a temporary injunction should not be issued by this court as prayed for in the bill of complaint, and affidavit herewith, enjoining and restraining the defendants, Charles H. Baldwin, Thomas Parran, Jr., and Kenneth F. Fee as members of the Milk Control Board of the State of New York, and each of them from proceeding in any manner to enforce the aforesaid statute, Chapter 158 of the laws of 1933 of the laws of the State of New York, or any of the orders made by defendants pursuant to said statute, as against complainant, and it further appearing that the defendants have made an order forfeiting the license of complainant as a milk dealer, unless complainant pay over to defendants the sum of $23,000.00 before January 31, 1934, which said sum will be distributed by defendants to 450 milk producers,

And it appearing from the verified complaint on file herein and the court being of the opinion that irreparable

loss and damage will result to complainant unless a temporary restraining order is granted herein before notice can be served and a hearing had thereon; this restraining order is therefore granted without notice under the provisions of Sections 380, 381, title 28, United States Code (Judicial Code Section 266, amended), now, therefore, it is

Ordered, that the defendants and each of them, individually or as members of the Milk Control Board of the State of New York, be and they hereby are restrained until the 12th day of February, 1934, and until the hearing and determination of the application of the complainant for its interlocutory injunction herein by three judges as provided by statute, from in any manner proceeding with the [fol. 6] enforcement of said statute, Chapter 158 of the laws of 1933 of the laws of the State of New York, or of any orders made by defendants pursuant to said statute, as against complainant, and it is further

Ordered, that the complainant file a bond conditioned as required by law in the sum of $1,000.00 for the payment of all damages which may accrue by virtue of the issuance of the restraining order; and it is further

Ordered by the court that this order shall be in full force, obligatory and binding upon the said defendants and each of them and all persons acting by, through or under them, upon service of a copy thereof upon them, or their solicitor or solicitors of record in this cause; and sufficient cause appearing

Let a copy of the affidavit of Benjamin Greenberg and of the bill of complaint in the above cause, and a copy of this order and a subpœna in the said cause be served upon Honorable Herbert H. Lehman, Governor of the State of New York, and upon Honorable John J. Bennett, Jr., Attorney General of the State of New York.

This order, signed at New York, on the 30th day of January, 1934, at 4:30 o'clock P. M.

Wm. Bondy, United States District Court Judge for the Southern District of New York.

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT

To the Honorable Judges of the District Court of the United States in and for the Southern District of New York:

Hegeman Farms Corporation, a corporation duly organized and existing under and by virtue of the laws of the State of New York, having its principal place of business in the Borough of Queens, City and State of New York, and being a resident of the Eastern District of New York, brings this, its bill of complaint against Charles H. Baldwin, Thomas Parran, Jr., and Kenneth F. Fee as members of the Milk Control Board of the State of New York, and shows unto your Honors as follows:

First. Plaintiff suing on behalf of itself and all others similarly situated brings this bill of complaint against defendants as members of the Milk Control Board of the State of New York.

Second. The value of the matter in dispute herein is in excess of the sum of Three thousand ($3,000.00) Dollars exclusive of interest and costs.

Second-A. Defendants Thomas Parran, Jr. and Kenneth F. Fee maintain an office for the regular conduct of this business in the Borough of Manhattan, New York City, in the Southern District of New York.

Third. This action is a suit in equity and arises under the Constitution and Laws of the United States as will [fol. 8] hereinafter more particularly appear. Among other things this suit is brought to prevent the deprivation under color of a certain statute of the State of New York, of certain rights and immunities secured to plaintiff by the Constitution of the United States, that is, a right to have and enjoy its property without being deprived thereof without due process of law, and without being denied the equal protection of the law, and a right to enjoy its liberty without being deprived thereof without due process of law and without being denied the equal protection of the law,

and this suit among other things, involves the question as to whether or not plaintiff may purchase and offer to purchase milk and dairy products from milk producers and others at such prices as plaintiff is willing to offer and at such prices as milk producers and others are willing to sell, and whether plaintiff may sell and offer for sale milk and milk products owned by it at such prices as it desires, and whether said statute preventing plaintiff from purchasing and offering to purchase milk and dairy products from milk producers and others at such prices as plaintiff is willing to pay and such milk producers and others are willing to sell, and preventing plaintiff from selling and offering for sale milk and milk products at such prices as it desires, is not contrary to the Constitution of the United States, and whether defendants in threatening to enforce the provisions of the said statute against the plaintiff, its officers and agents, are not depriving plaintiff of its property and its right to engage in business without due process of law, and whether they are not denying plaintiff the equal protection of the law.

This suit is brought to prevent defendants from proceed- [fol. 9] ing under and by virtue of the provisions of the Statute of the State of New York, hereinafter referred to, from illegally and unlawfully threatening plaintiff with the revocation of plaintiff's license to carry on the business of a milk dealer and from inflicting upon plaintiff monetary penalties under color of said Statute.

Fourth. Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

Plaintiff is engaged in the purchase and sale of milk and milk products in the City and State of New York. The said business is a lawful one and the pursuit thereof cannot be prohibited directly or indirectly.

Fifth. Plaintiff is the owner of valuable properties consisting of realty and the improvements thereon at Kortright Station, Bloomville, N. Y., Sheds Corners, Sheds, N. Y., Maybury Mills, McGraw, N. Y. and Youngs Crossing, Truxton, N. Y., which four properties are owned free and clear of mortgages, and the fair present value of which is upwards of One hundred fifty thousand ($150,000.00) Dollars. Plaintiff is also the owner of two sites and the

improvements thereon in the Borough of Queens, City and State of New York, which improvements are respectively a distributing station and a pasturizing and bottling plant. The fair present value of plaintiff's equity in the said New York City properties is respectively One hundred fifty thousand ($150,000.00) Dollars and Ninety thousand ($90,000.00) Dollars. All of the improvements on the aforesaid properties are especially adapted for the carrying on of the milk business. Plaintiff is also the owner of a fleet of [fol. 10] delivery trucks and a large amount of equipment used in the carrying on of its business, and the fair present value of said trucks and equipment is upwards of Sixty thousand ($60,000.00) Dollars.

Plaintiff corporation was organized in 1921 and during the past five years it has sold an average of $750,000.00 a year, and the present fair value of the plaintiff's good will is upwards of One hundred thousand ($100,000.00) Dollars.

Sixth. In 1933 the Legislature of the State of New York by Chapter 158 of the 1933 Laws of the State of New York amended the Agriculture and Markets Law of the State of New York by adding thereto a new article to be Article 25. A copy of the said Statute, Chapter 158 is annexed hereto as Exhibit "A".

Seventh. On or about June 22, 1933, there was duly issued to plaintiff pursuant to said Chapter 158 of the 1933 Laws of the State of New York, a license to carry on the business as a milk dealer, a copy of which license is annexed hereto as Exhibit "B". Plaintiff is also duly licensed in accordance with the Ordinances of the City of New York, to carry on the business of a milk dealer, and a copy of the said license is annexed hereto as Exhibit "C".

Eighth. Under the aforesaid statute defendants are empowered to fix by order the maximum and minimum wholesale and retail prices to be charged and paid for milk handled within the State of New York for fluid consumption, and in the event that plaintiff offer to purchase or purchase or offer to sell or sell fluid milk at prices less than or more than the price fixed by defendants, the defendants are empowered to suspend or revoke the plaintiff's license to carry on the business of milk dealer.

[fol. 11] Ninth. Defendants claim that in the past plaintiff has purchased milk at prices less than that fixed by

defendants, in accord with said statute, and defendants by orders dated December 29, 1933, and December 30, 1933, copies of which are annexed hereto as Exhibits "D" and "E", have threatened to revoke plaintiff's aforesaid license received by it from the State of New York, which permits it to carry on the business of milk dealer, unless plaintiff pay to the milk producers which sold milk to plaintiff during May, June, July, August and September of 1933, an amount specified in the order of defendants dated December 30, 1933, for each one hundred (100) pounds of milk purchased by plaintiff during said period. The total amount which plaintiff would be required to pay under such order is upon information and belief upwards of Twenty-three thousand and 00/100 ($23,000.00) Dollars, and upon information and belief in the event that defendants are acting without legal authority in ordering plaintiff to make such payments, plaintiff would be without remedy to recover back the payments thus ordered by defendants to be paid, or else a multiplicity of suits would be required to recover back such payments. Defendants, moreover, threaten to enforce the aforesaid Statute and all its terms against the plaintiff in the event that plaintiff offer to purchase or purchase or sell or offer to sell milk in fluid form at a price more or less than the price fixed by defendants, and in such event defendants will revoke the license received by plaintiff from the State of New York to carry on the business of milk dealer, a copy of which license is annexed hereto as Exhibit "B", and which revocation of said license will result in a forfeiture of said license and in a forfeiture of the license issued to plaintiff from the [fol. 12] City of New York, a copy of which is annexed hereto as Exhibit "C", and will further result in a destruction of a substantial part of the value of plaintiff's properties, since such properties are peculiarly adapted to the carrying on of the business of buying and selling milk, in which business plaintiff will be unable to engage without such licenses.

The aforesaid Statute is in its terms so drastic and the penalties attached to the violation of its terms so great that plaintiff may not with safety refuse to comply with the aforesaid orders of defendants dated December 29, 1933, and December 30, 1933, and may not offer to purchase or purchase or offer to sell or sell fluid milk at prices

other than those fixed by the defendants even to test the constitutionality of the said Statute, and unless this Court shall determine the validity of the said Statute plaintiff will be compelled to submit to the said Statute whether the same be valid of invalid, and will be compelled to submit to defendants' threats and will be deprived of its property and liberty without due process of law, and will be denied the equal protection of the law, in contravention of the 14th Amendment of the Constitution of the United States, and plaintiff has no adequate remedy at law and may obtain relief only in a Court of Equity.

Tenth. The aforesaid Statute, Chapter 158 of the 1933 Laws of the State of New York, is unconstitutional and void under the 14th Amendment of the Constitution of the United States in that it deprives plaintiff of its liberty and property without due process of law and of the equal protection of the law, and if plaintiff is not permitted to offer to purchase and purchase fluid milk at such prices [fol. 13] as the plaintiff is willing to pay therefor, and the vendors thereof willing to sell the same, and to sell fluid milk at such prices as it desires, it will suffer great and irreparable loss for which there is no adequate remedy at law, and for which relief can be obtained only in a Court of Equity.

For a Second Cause of Action

Eleventh. Repeats and realleges as if fully set forth each and every allegation contained in paragraphs "First" to "Ninth" inclusive.

Twelfth. The aforesaid statute, Chapter 158 of the Laws of 1933 of the State of New York, provides that the business of producing, transporting, distributing and selling milk in the State of New York, is a business affected with a public interest.

Thirteenth. Defendants acting under the authority conferred upon them by the aforesaid statute fixed One and 86/100 ($1.86) Dollars per one hundred (100) pounds for milk containing three and five-tenths (3.5) butter fat plus an additional four ($.04) cents per hundred pounds for each additional one-tenth of one percentum (1/10 of 1%) of butter fat content as the price which plaintiff must pay

for milk after May 16, 1933, in the event that such milk was ultimately to be used for consumption as fluid milk, and One and 30/100 ($1.30) Dollars per one hundred (100) pounds in the event that the milk was ultimately to be used for consumption as fluid cream, which purposes namely, sale for consumption as fluid milk or as fluid cream were and are the purposes for which plaintiff purchased and purchases milk, the said prices so fixed by defendants being applicable in the event that such milk was purchased in the territory in which plaintiff made and makes it- milk pur-
[fol. 14] chases, which territory is customarily known *a* in the milk industry as the 200-210 mile zone, that being the distance of such territory from the City of New York.

Fourteenth. The said prices so fixed by defendants for milk purchased to be sold for the purposes of consumption as fluid milk and fluid cream remained in effect until July 21, 1933, upon which date the price to be paid for milk to be ultimately utilized for consumption as fluid milk in the said 200-210 mile zone, was fixed at Two and 23/100 ($2.23) Dollars per one hundred (100) pounds, plus a seven and one-half ($.07½) cent charge to be paid to plaintiff's vendors, which charge was designated by defendants as a freight differential, plus four ($.04) cents for each additional one-tenth of one percentum (1/10 of 1%) of butter fat content of such milk over and above a butter fat content of three and five-tenths (3.5) of butter fat content, and upon said July 21, 1933, the price to be paid by the plaintiff to its vendors in the said 200-210 mile zone for milk ultimately to be sold for the purpose of consumption as fluid cream was fixed at One and 55/100 ($1.55) Dollars per one hundred (100) pounds. The said *price* prices so fixed by defendants on July 21st have at all times since that date remained and still are in full force and effect according to the orders issued by defendants pursuant to the aforesaid statute.

Fifteenth. Defendants acting under the aforesaid statute fixed eight ($.08) cents per quart as the price for which milk of the grade known as "Grade B" milk could be sold in the City of New York at wholesale after May 16, 1933. The said "Grade B" milk is the grade of milk which at all times herein mentioned has been sold by plaintiff, and the City of New York is the territory in which plaintiff made and makes its sales.

[fol. 15] Sixteenth. The said price of eight ($.08) cents so fixed by defendants remained in effect until July 21, 1933, when by order of defendants made pursuant to the aforesaid statute, the said wholesale price of said milk in the City of New York was fixed at nine ($.09) cents per quart in the City of New York, and said price of nine ($.09) cents at all times since has been and is the price which remains in force under the orders made by the defendants under the aforesaid statute.

Seventeenth. Defendants acting under the said statute fixed as the wholesale prices at which fluid cream could be sold within the City of New York, after May 16, 1933, twenty-seven ($.27) cents, thirty-nine ($.39) cents and forty-five ($.45) cents, per quart, the variance in the said prices so fixed by the board being dependent upon differences in the butter fat content of said fluid cream.

Eighteenth. The said prices so fixed by the board for fluid cream remained in full force and effect until July 21, 1933, when the prices for such fluid cream were fixed by the board at thirty-one ($.31) cents, Forty-four ($.44) cents and fifty-three ($.53) cents dependent upon the butter fat content of such fluid cream, and the said prices so fixed on July 21, 1933 have at all times — and remain and still are in full force and effect under the orders of the defendants made pursuant to the aforesaid statute.

Nineteenth. The aforesaid prices fixed by defendants as the prices at which "Grade B" milk and fluid cream could be sold at wholesale in the City of New York, were designated in the orders of defendants as minimum prices but *[fol. 16] in practical effect and for all purposes such prices* so fixed by defendants likewise fixed the maximum price at which plaintiff could sell milk and cream since the competition offered by other milk dealers in the City of New York prevented and prevents plaintiff from selling milk or cream at prices higher than those fixed by defendants in their orders.

Twentieth. The difference between the prices thus fixed by defendants as the prices which plaintiff must pay for milk purchased by it and the prices at which such milk could be sold whether in the form of "Grade B" milk or fluid cream, has at all times been and now is insufficient in

amount to afford to plaintiff a fair return on the present fair value of the properties devoted by it to its milk business less depreciation, and the said prices thus fixed were and are such as to confiscate plaintiff's property without due process of law and to deprive plaintiff of the equal protection of the law, and the said prices thus fixed by defendants and the said orders thus made by defendants violated and violate plaintiff's rights to due process of law and to the equal protection of the law under the 14th amendment of the Federal Constitution.

Twenty-first. The aforementioned orders of defendants annexed hereto as Exhibits "D" and "E" and providing for the revocation of plaintiff's license as a milk dealer unless it pay over to defendants the sums called for by said orders, are based upon the aforesaid confiscatory price and confiscatory orders fixed and made by defendants, and defendants' attempt to enforce the prices so fixed by it by enforcing against plaintiff their said orders, copies of which are annexed hereto as Exhibits "D" and "E", and defendants' threat to enforce the aforesaid statute and all of its penalties against plaintiff and to revoke plaintiff's [fol. 17] license as a milk dealer unless plaintiff purchase and sell its milk at the prices fixed by defendants, violates plaintiff's right to due process of law and to the equal protection of the law as guaranteed to plaintiff by the 14th amendment to the Federal Constitution.

Wherefore, plaintiff prays:

That defendants as the Milk Control Board of the State of New York, be enjoined and restrained by preliminary and permanent order and injunction from enforcing against plaintiff the said Statute, Chapter 158 of the 1933 Laws of the State of New York, and the aforesaid orders made by defendants, namely, the orders fixing the prices at which plaintiff may purchase and sell milk, and the orders annexed hereto as Exhibits "D" and "E", and that an order to show cause issue hereunder upon the application of plaintiff to defendants requiring them to show cause why a temporary injunction should not issue as prayed for herein; that the aforesaid statute Chapter 158 of the 1933 Laws of the State of New York be declared unconstitutional, illegal and void, and that the aforesaid orders of defendants fixing the prices at which plaintiff may purchase and sell

milk be declared confiscatory of plaintiff's property, unconstitutional, illegal and void, and

That a writ of subpœna may issue to defendants as the Milk Control Board of the State of New York, requiring them to answer this bill of complaint fully and truthfully but not on oath, an oath being hereby waived, and that such further relief be granted as the nature of plaintiff's case may require or to Equity may seem just and proper.

Rubinton & Coleman, Solicitors for Plaintiff.

[fol. 18] *Duly sworn to by Benjamin Greenberg. Jurat omitted in printing.*

[fol. 19] EXHIBIT "B" TO BILL OF COMPLAINT

License No. 2268. Code: D-D, C, S. Class: —.

State of New York

(Seal)

Department of Agriculture and Markets

Milk Control Board

Hegeman Farms Corporation (Name of Licensee), of 1624 Centre Avenue, Ridgewood, L. I., N. Y. (Address), is hereby licensed as a milk dealer, pursuant to the provisions of Article 25 of the Agriculture and Markets Law (Chapter 158 of the Laws of 1933) to buy milk from producers at the place or places named in the licensee's application, to buy milk from others and to sell or distribute milk in the market or markets named in the licensee's application; provided that no milk as defined in Article 25, shall be purchased from or sold to an unlicensed milk dealer, and no milk as so defined shall be dealt in or handled if the licensee has reason to believe that it has been dealt in or handled in violation of Article 25; and provided further that the licensee shall return for producers the benefits of any increase of prices received by virtue of the minimum price provisions of Section 312 of the Agriculture and Markets Law.

This license is valid until March 31, 1934, unless sooner revoked.

Dated at Albany, N. Y., June 22, 1933.

Milk Control Board, Kenneth F. Fee, Director.

$250.00.

[fol. 20] EXHIBIT "D" TO BILL OF COMPLAINT

State of New York, Department of Agriculture and Markets

Milk Control Board

In the Matter of the Proposed Revocation of the License Heretofore Issued to Hegeman Farms Corporation Pursuant to the Provisions of Article 25 of the Agriculture and Markets Law

Official Order

Hegeman Farms Corporation having applied to the Milk Control Board for a license under Article 25 of the Agriculture and Markets Law, and such license having been issued, and notice having been given to Hegeman Farms Corporation of the time and place of a hearing with respect to the proposed revocation of such license, and such hearing having been had, and the licensee having appeared, and evidence having been received, and due deliberation having been had;

It is hereby ordered that License No. 2268 issued to Hegeman Farms Corporation under date of June 22, 1933, be and the same hereby is revoked.

This revocation becomes effective January 31, 1934 at 6:00 P. M.

Milk Control Board, Charles H. Baldwin, Thomas Parran, Jr., Kenneth F. Fee. (Seal of Milk Control Board, State of New York.)

Dated Albany, N. Y., December 29, 1933.

[fol. 21] EXHIBIT "E" TO BILL OF COMPLAINT

State of New York, Department of Agriculture and Markets

Milk Control Board

In the Matter of the Proposed Revocation of the License Heretofore Issued to Hegeman Farms Corporation, Pursuant to the Provisions of Article 25 of the Agriculture and Markets Law

Official Order

Whereas on the 29th day of December, 1933, the license heretofore issued to Hegeman Farms Corporation pursuant to Article 25 of the Agriculture and Markets Law was ordered revoked effective at 6:00 P. M. on January 31, 1934;

It is hereby ordered that if the said Hegeman Farms Corporation shall pay to each and every producer who has delivered milk to any of the plants operated by the said Hegeman Farms Corporation in the State of New York a sum which will bring the total payment to each such producer for all of the milk delivered during the months of May, June, July, August and September up to the minimum payments as required by the official orders of the Milk Control Board, and if the said Hegeman Farms Corporation shall furnish to the Milk Control Board on or before January 29, 1934 satisfactory evidence showing that such payments have been made, then and in that event the order of the Board revoking the license of the said Hegeman Farms Corporation shall be suspended so long as the said Hegeman Farms Corporation shall comply with all of the official orders of the Board, including orders relating to the minimum prices to be paid by milk dealers to producers.

The additional payments to be made to producers as indicated above shall be for not less than the amounts per hundred pounds of milk delivered to each of the several plants for the respective months as indicated in the following table.

Period	Maybury	Youngs Crossing	Kortright	Sheds
May 16–31	$.0325	$.16	$	$.093
June	.202	.215	.184	.110
July 1–20	.2731	.2736	.2406	.2684
July 21–31	.421	.432	.387	.419
August	.079	.184	.109	.185
September	.1855	.2762	.2085	.2887

Milk Control Board, (S.) Charles H. Baldwin, for Thomas Parran, Jr.; (S.) Kenneth F. Fee. (Seal.)

Dated Albany, N. Y., December 30, 1933.

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF BENJAMIN GREENBERG

STATE OF NEW YORK,
County of Kings, ss:

Benjamin Greenberg being sworn, says: I am the President of Hegeman Farms Corporation, the plaintiff herein, and I submit this affidavit in support of the application made by plaintiff for a temporary injunction pending the final determination of the action, restraining defendants from enforcing against plaintiff the statute known as Chapter 158 of the Laws of 1933 of the State of New York, a copy of which is annexed in full to the complaint.

The plaintiff is engaged in the sale of milk at wholesale in the City of New York, and its business was established in 1921. Plaintiff has continuously operated as a wholesale distributor of milk in New York City since that time.

Plaintiff is the owner of valuable properties which it uses in connection with its business and which are located at Kortright Station, Bloomville, N. Y., Sheds Corners, Sheds, N. Y., Maybury Mills, McGraw, N. Y., and Youngs Crossing, Truxton, N. Y. These properties consist of realty and the improvements thereon and are utilized by plaintiff in [fol. 23] connection with the receipt of milk purchased by it from upstate producers. The four properties to which I have referred are owned by plaintiff free and clear of all mortgages, and the present reasonable value of these four

properties is approximately $150,000.00. Plaintiff also owns a distributing station and a pasturizing and bottling plant, which two properties are located in the Borough of Queens, New York City. The value of the plaintiff's equities in its two New York City properties is respectively $150,000.00 and $90,000.00. The value which I have given for these properties represents the present value of the land plus the present reasonable cost of constructing the improvements which have been placed upon the land less the depreciation which has taken place in the improvements. All of the properties owned by plaintiff are such as to be peculiarly adapted by reason of the improvements thereon, to the carrying on of the wholesale milk business. Plaintiff also owns a fleet of delivery trucks and a large amount of equipment which is necessary to the carrying on of its wholesale milk business, and the present reasonable value of such trucks and equipment is about $60,000.00. This value represents the present cost of replacing the trucks and equipment less the depreciation that has taken place in such property.

The average annual amount of sales made by plaintiff during the past five years has been approximately $750,000.00. Plaintiff's present business and organization has been developed after many years of operation and its business today taken as a whole, has a substantial going value over and above the value of the physical assets to which I have referred.

The said milk business which plaintiff carries on is a [fol. 24] lawful one which consists of the purchase and sale of milk and the pursuit thereof cannot validly be prohibited either directly or indirectly.

The aforesaid statute of the State of New York, Chapter 158 of the Laws of 1933, declares the milk industry to be affected with a public interest and creates a board known as the milk control board which is empowered to supervise and regulate the entire milk industry of the State of New York. Defendants are the present members of said board. Among other powers the board is authorized by the said statute to fix by order, the wholesale and retail minimum and maximum prices which may be paid and received for milk handled within the State of New York for fluid consumption.

The statute in this connection provides that it shall be unlawful to sell within the State of New York milk which has been produced without the state in the event that such milk has been purchased from the producer without the state at a price lower than that required to be paid for milk within the state. This provision of the statute affects a substantial part of the milk which is consumed within the State of New York, since at least twenty per cent of the milk consumed within the State of New York is produced in other states.

The defendants themselves, according to apparently authentic articles which have appeared in the current press, have recognized their inability to control the milk supply which thus comes into the State of New York from other states. Such articles appeared in The New York Times of January 3, 1934 and January 8, 1934. I annex copies of such articles hereto as Exhibits "I" and "II".

The defendants have threatened to enforce the aforesaid [fol. 25] statute, Chapter 158 of the New York Laws of 1933, against plaintiff, and defendants claim that in the past plaintiff has purchased milk at prices less than that fixed by defendants, which prices were fixed by defendants under the authority granted to them by the aforesaid statute.

Defendants have threatened to revoke the plaintiff's license to carry on the business of milk dealer, a copy of which license is annexed to the complaint, unless plaintiff pay to the producers who sold milk to plaintiff during the months of May to September inclusive, 1933, an amount which is specified in an order of the defendants dated December 30, 1933, for each one hundred pounds of milk purchased by plaintiff during the said period from May to September. A copy of the said order setting forth the amounts which plaintiff has been ordered to pay for each one hundred pounds of milk purchased by it during said period, or in the alternative to lose its license, is annexed to the complaint. The total amount which plaintiff would be compelled to pay under the said order of defendants would be upwards of $23,000.00, and this money will be turned over by defendants to the various producers who sold milk to plaintiff during the said period of May to September.

Should plaintiff pay to defendants the said $23,000.00 which payments defendants have imposed upon plaintiff as a condition of plaintiff retaining its license, and should the order of defendants be ultimately held invalid either by reason of the unconstitutionality of the statute under which defendants are acting or by reason of the invalidity of the order irrespective of the constitutionality of said statute, it is extremely doubtful whether plaintiff could recover back the monies so paid from the milk producers to whom the [fol. 26] money would be turned over by defendants. In any event a multiplicity of suits would be required to recover back the money after it had been turned over to the producers by defendants inasmuch as plaintiff during the period from May to September purchased its milk from approximately four hundred fifty producers, so that some four hundred fifty law suits would be necessitated. For this reason among others, plaintiff is asking that the defendants be stayed from the enforcement of the said orders of December 29th and December 30th, 1933, until the present application for a temporary injunction is determined.

Defendants furthermore threaten to enforce the aforesaid statute against plaintiff in the event that it offer to purchase or purchase or sell or offer to sell milk in fluid form at prices other than those fixed by defendants, and in such event defendants will revoke plaintiff's license to carry on the business of a milk dealer.

By reason of the aforesaid statute and its threatened enforcement against plaintiff by defendants, plaintiff is unable to deal in fluid milk at prices other than those fixed by defendants, even for the purpose of testing the constitutionality of the said statute, since the statute is in its terms so drastic and the penalties attached to the violation of its terms so great, that plaintiff may not with safety refuse to comply with the aforesaid orders of defendants, and could not safely deal in milk at prices other than those fixed by defendants.

The threatened enforcement of the statute by defendants will result in a forfeiture of the license received by plaintiff from the State of New York to carry on the business of milk dealer, and the revocation of the said State license will necessarily result in a forfeiture of the license [fol. 27] issued to plaintiff from the City of New York, copies of which licenses are annexed to the complaint, and

the forfeiture of such licenses will result in a destruction of the principal part of the value of plaintiff's properties which are such as to be peculiarly adapted to carrying on the business of buying and selling milk, which business plaintiff will be unable to pursue without such licenses.

The aforesaid statute, Chapter 158 of the Laws of 1933 of the State of New York, is, upon information and belief, unconstitutional and void under the 14th amendment of the Constitution of the United States in that it deprives plaintiff of its liberty and property without due process of law and of the equal protection of the laws.

The orders which defendants have made pursuant to the said statute, which orders fix the price which plaintiff must pay for milk purchased by it, and the price at which plaintiff may sell milk, are moreover, such that they do not afford plaintiff a fair return upon the present fair value of its properties less depreciation, which values I have previously set forth.

The orders therefore, irrespective of the constitutionality of the statute, are such as to confiscate plaintiff's property without due process of law and to deny plaintiff the equal protection of the law so that such orders are in any event unconstitutional, illegal and void.

All of plaintiff's sales consist of sales of fluid milk and of fluid cream. All of the purchases made by plaintiff are made within the territory known as the 200-210 mile zone, this being the distance of such territory from New York City. Defendants acting under the aforesaid statute, made an order which provided that on and after May 16th, no [fol. 28] milk should be purchased within the said 200-210 mile zone, which milk was to be sold for the purpose of consumption as fluid milk, unless the purchaser paid for such milk One and 88/100 ($1.88) Dollars per hundred pounds for milk containing three and five-tenths (3.5) of butter fat, plus an additional four ($.04) cents per hundred pounds for each additional one-tenth of one per centum (1/10 of 1%) of butter fat content. The defendants further ordered that on and after May 16th that the price to be paid in the said 200-210 mile zone for milk which was to be sold for fluid cream should be One and 30/100 ($1.30) Dollars per one hundred pounds.

These prices thus fixed by defendants as the purchase prices applicable to the milk purchased by plaintiff remained in effect until July 21st.

Upon July 21, 1933, by order of defendants which was made under the aforesaid statute, the price of milk in the said 200-210 mile zone was fixed at Two and 23/100 ($2.23) Dollars per one hundred (100) pounds plus four ($.04) cents per hundred pounds for each one-tenth of one per centum (1/10 of 1%) of butter fat, and plus an additional seven and one-half ($.07½) cents which defendants designated as a freight differential. Such price so fixed to go into effect on July 21, 1933, was applicable to milk which was being purchased for the purpose of resale as fluid milk, and defendants fixed One and 55/100 ($1.55) Dollars as the price within the said territory for milk which was being purchased for resale as liquid cream.

The prices so fixed by defendants on July 21st have ever since and now remain in force and effect.

Defendants acting under the aforesaid statute fixed eight [fol. 29] ($.08) cents a quart as the price for which "Grade B" milk could be sold at wholesale in the City of New York after May 16, 1933. Such "Grade B" milk is the grade which is sold by plaintiff. This price so fixed by defendants at which "Grade B" milk could be sold in New York City, remained in effect until July 21, 1933, when by order of defendants the price at which such milk could be sold in New York City was fixed at Nine ($.09) cents per quart, which is the price still in effect at the present time. Defendants by order made under the aforesaid statute, provided that on and after May 16th the prices at which fluid cream could be sold in the City of New York should be twenty-seven ($.27) cents, thirty-nine ($.39) cents and forty-five ($.45) cents. The prices so fixed varied according to the butter fat content of the cream; the higher the content the higher the price allowed. The three prices so fixed were applied respectively to the grades of cream known as light, medium and heavy cream.

The prices so fixed at which fluid cream could be sold remained in effect until July 21st, when defendants fixed as the prices at which fluid cream could be sold dependent upon the butter fat content, thirty-one ($.31) cents, forty-four ($.44) cents, and fifty-three ($.53) cents. The said prices are applicable respectively to the said grades known as light, medium and heavy cream. These prices so fixed on July 21, 1933 as the prices at which cream could be sold at wholesale in the City of New York ever since remained and now are in effect.

The prices to which I have referred and which defendants fixed as the prices at which "Grade B" milk and fluid cream could be sold in the City of New York, were designated in the orders made by defendants as being minimum [fol. 30] prices. In actual practice and for all purposes however, the prices fixed by defendants likewise fixed the maximum price at which plaintiff could sell the milk purchased by it. The reason for this is that very keen competition is presented in the wholesale milk business in New York City, and were plaintiff to attempt to charge more than the prices fixed by defendants in their orders, the result would be an immediate loss by plaintiff of practically all, if not all, of its trade, with a resultant immediate and almost complete destruction of the value of plaintiff's properties. It is possible that competing dealers might also in time be forced out of business, but this would not operate to restore to plaintiff the value of its properties since those properties are peculiarly adapted to the carrying on of the milk business, and the carrying on of that business depends in the City of New York, upon the continuous maint*ain*en-ce of the good will of the trade served by the milk dealer, so that any considerable interruption of service by the milk dealer would mean the practically complete loss of the dealer's good will.

The difference between the prices thus fixed by defendants as the prices which plaintiff must pay for the milk purchased by it and the prices which defendants fixed as the selling price of such milk has at all times been and now is insufficient in amount to afford to plaintiff a fair return on the present fair value of the properties devoted by plaintiff to its milk business less depreciation, which present fair value less depreciation as I have previously pointed out, is Four hundred fifty thousand ($450,000.00) Dollars plus the substantial going value of the business.

Indeed the difference between the prices so fixed by the board has not been sufficient to even cover the actual ex- [fol. 31] penses of operating the plaintiff's business let alone affording to plaintiff a fair return upon the value of its properties.

The figures which I am setting forth hereinafter represent the actual expense of my company in its operations since the enactment by the defendants of their orders fixing the purchase and selling price of milk. My company

sells practically all of the milk purchased by it for consumption as fluid milk. A very negligible amount, not more than about one per cent of the milk is sold as fluid cream. The figures which I am setting forth are calculated without taking into consideration the sales of fluid cream, since such sales are so trifling in amount as to have no effect on the calculation.

Defendants in fixing the purchase price of milk have fixed it at a certain amount for 100 pounds. In actual practice the milk is delivered by the purchasers to plaintiff and to other milk dealers in 40 quart cans, the contents of which weigh 85 pounds. It at all times has been and still is the custom of plaintiff as well as other milk dealers, to make their calculations on the basis of such 40 quart cans and to compute their operating costs upon that basis. For this reason I am using the 40 quart can containing 85 pounds of milk as the basis of the figures which I am setting forth.

(a) Cost of milk to plaintiff (after May 16th and to July 21, 1933). The milk purchased by plaintiff averaged and still averages 3.6% butter fat content. The price fixed by defendants from May 16th to July 21, 1933, was $1.88 per hundred pounds for 3.5% butter fat, plus $.04 a hundred pounds for each 1/10 of 1% of butter fat content. The [fol. 32] price of one hundred pounds of such 3.6% butter fat milk would be $1.92 and the cost of a can of milk containing 85 pounds if 85/100 of $1.92 or $1.632. (Since July 21, 1933.)

Defendants fixed $2.23 per hundred pounds for milk containing 3.5% butter fat plus $.04 for each 1/10 of 1% of butter fat content, and plus an additional $.07½ per hundred pounds designated as a freight differential. The price of a hundred pounds of milk containing 3.6 butter fat content being the grade of milk purchased by plaintiff, would be $2.345, and the price of a can containing 85 pounds would be 85/100 of that amount or $1.99325.

(b) Cost of handling milk at upstate creameries. Some milk is delivered by producers to the four creameries maintained by plaintiff upstate and some milk purchased by plaintiff is picked up at the dairies of the purchasers by trucks operated by plaintiff. The milk received is weighed, cooled, strained and tested for butter fat content and acidity. The milk is poured into freight tank cars or tank

trucks for shipment to the company's pasturization and bottling plant in New York City. The cost of these operations at the upstate plants is $.1569 per can.

(c) Cost of transportation. The cost of transporting the milk from the upstate plan-s to plaintiff's pasturization and bottling plant in New York City including the rental paid [fol. 33] by plaintiff for the three tank freight cars used by it and including all trucking expenses is $.3503 per can.

(d) Cost of pasturization and bottling. The milk sold by plaintiff is pasturized and bottled at its New York City plant. The cost of these operations including laboratory expenses and all supplies consumed such as caps for bottles, is $.1538 per can.

(e) Delivery expenses. The cost of delivery including the maintenance of automobiles is $.4107 per can.

(f) All other direct operating expenses. The cost of all other operating expenses including the cost of collecting cases in which milk is delivered, ice which is required in handling milk, labor cost for loading milk on delivery trucks, and breakage of bottles is $.2192 per can.

(g) General expenses and overhead. This item which includes all office overhead including office labor and all salaries paid to officers is equal to $.2509 per can.

(h) Bad debts. Bad debts of plaintiff averaged 1% of sales which from May 16th to July 21st was equivalent to $.032 per can and since July 21st is equivalent to $.036 per can.

(i) Spillage loss. Out of each can of milk purchased by plaintiff there is lost due to unavoidable spillage in the handling of the milk, an average of ½ quart per can.

(j) Amount received by plaintiff for each can of milk [fol. 34] purchased by it. Out of each can of milk purchased by plaintiff containing 40 quarts there was available for sale after the spillage loss 39½ quarts for which plaintiff received between May 16th and July 21st at the rate of $.08 a quart, a total of $3.16 and since July 21st a total of $3.555. These figures show a total operating expense to plaintiff for each can of milk handled by it of $1.5738 per can between May 16th and July 21st, and a total of $1.5778

per can since July 21st. The difference is due to the difference in the loss caused by bad debts which is 4/10ths of a cent greater since July 21st.

A recapitulation of the operating expense of plaintiff since May 16th shows the following:

	From May 16th to July 21st		From July 21st to Sept. 30th	
Cost per can	.1632		.199325	
Upstate Creamery Cost	.1569		.1569	
Transportation	.3503		.3503	
Pasturization and bottling	.1538		.1538	
Delivery	.4107		.4107	
Other direct operating costs	.2192		.2192	
General expense and overhead	.2509		.2509	
Bad debts	.032		.036	
Total operating cost		(1.5738)		(1.5778)
Total cost	3.2058		3.57105	
Amount received	3.16		3.535	
Loss per can	.0458		.01605	

The cost to my company per can for handling the milk sold by it is very reasonable as indicated by a report prepared for and made to the New York State Milk Control [fol. 35] Board by Professor Leland Spencer of Cornell University, an authority on the dairy industry. Professor Spencer in his report calculated the operating cost of thirty dealers in New York City for the month of August, 1933, which is one of the months included in the calculation of the operating cost of my company. His method of segregating costs is different than that followed by my company and he calculated costs in his report on the basis of each quart sold, instead of each can, so that his figures must be multiplied by forty in order to show the cost of handling per can.

Professor Spencer's report sets forth the following as the operating cost of thirty New York City dealers for the month of August, 1933:

Freight	.0063
Plant Costs	.0093
Selling and Delivery	.0293
General and Administrative	.0018
Total operating cost	.0413

The total operating cost thus shown in Professor Spencer's report is .0413 per quart or $1.652 per 40 quart can, which is .0782 per can more than my company's operating expenses from May 16th to July 21st, and .0742 per can more since July 21st. It follows beyond all question therefore, that the operating expenses of my company which are such that my company operates at an actual loss under the price fixed by defendants, are beyond any question reasonable for they are a substantial amount less than the amounts found to be the operating costs of dealers in New York City in the very report made to defendants by Professor Spencer.

Under the prices fixed by defendants as the purchase price and the selling price of the milk, no profit at all is made by plaintiff, and, therefore, no return at all is made [fol. 36] upon the investment which it has devoted to the carrying on of the milk business.

It follows that irrespective of the validity of the statute under which defendants are acting, that the orders which they have issued are invalid and unconstitutional since they confiscate plaintiff's property without due process of law, such orders being the orders fixing prices, and the order directing the revocation of plaintiff's license, which order is based upon plaintiff's alleged violation of the price orders.

Furthermore the orders which defendants seek to enforce against plaintiff and which are annexed to the complaint as Exhibits "D" and "E", *and* invalid, unconstitutional since they were made by the Board against plaintiff without affording to plaintiff due notice of the charges which are the basis of the orders, and without affording to plaintiff a reasonable opportuinty to be heard and to present its evidence before the orders were made.

No notice was ever given to plaintiff of the charge which defendants were making against plaintiff or of the alleged violations of law of which defendants claim plaintiff had been guilty. Plaintiff was given a notice to appear before the defendants acting as the Milk Control Board but the notice set forth no charge or complaint or any statement of any alleged unlawful conduct by plaintiff. Thereafter two perfunctory hearings were held before one member of the Milk Control Board, at which hearing the board for the

first time made known to plaintiff the charge being made against it, namely, that plaintiff had purchased milk at prices below those fixed by defendants in their orders. The proceedings which led to the making of the orders which are annexed to the complaint as Exhibit "D" and "E", [fol. 37] were in all respects like those recently reviewed by the Appellate Division, Third Department in the case of "In the Matter of the Application of Grandview Dairy Inc., Petitioner, for a Certiorari Order Against Charles H. Baldwin et al., Defendants", decided on January 19, 1934, and a report of the case appears in the New York Times of January 20, 1934, in which case the learned Appellate Division, Third Department, ruled that the order of the Milk Control Board revoking the license of Grandview Dairy Inc. unless it should pay over to the milk producers from which it had purchased its milk, certain sums, exactly as the orders against plaintiff provide, was invalid and unconstitutional since it had been made by the Milk Control Board without giving the milk dealer notice of the charges made against it, and due hearing upon these charges.

I respectfully submit therefore, that pending the final determination of the within action that defendants be temporarily enjoined from enforcing the aforesaid statute or any of its provisions against plaintiff, and that said defendants be so enjoined from enforcing against plaintiff the aforesaid orders annexed to the complaint as Exhibits "D" and "E", and that a temporary stay be granted pending the hearing and determination of the within application for a temporary injunction, which shall in the same manner stay the defendants from so acting.

No previous application for the relief herein sought has been made to this or to any other court.

Benjamin Greenberg.

Sworn to before me this 26th day of January, 1934.
M. H. Coleman, Notary Public, Kings County.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

Now come the defendants and for an answer to the plaintiff's bill of complaint plead as follows:

1. Defendants deny certain allegations of the bill of complaint which consist of conclusions of fact and conclusions of law, and respectfully refer to the Court the question whether such conclusions are justified. Such allegations are found in paragraph "Ninth" (second indented paragraph, which is also the last), also "Tenth", "Fifteenth", "Sixteenth", "Nineteenth", "Twentieth", and "Twenty-first".

2. It is respectfully submitted that the true and correct statement of fact which was intended to be made by paragraphs "Fifteenth" and "Sixteenth" is as follows: Defendants acting under the aforesaid statute fixed nine ($.09) cents per quart as the price for which milk of the grade known as "Grade B" milk could be sold in the City of New York at wholesale (i. e., from milk dealers to stores and restaurants) after May 16, 1933. The said price of nine ($.09) cents so fixed by defendants remained in effect until July 21, 1933, when by order of defendants made pursuant to the aforesaid statute, the said wholesale price of said [fol. 39] milk in the City of New York was fixed at ten ($.10) cents per quart, and said price of ten ($.10) cents at all times since has been and is the price which remains in force under the orders made by the defendants under the aforesaid statute. The plaintiff has been making such sales of milk at prices one cent under the respective prices so fixed, and claims the privilege of doing so by reason of section 317, subdivision (c) of the Milk Control Law.

3. The provisions of statutory law last above referred to is in terms applicable to the plaintiff, but it is respectfully submitted that the provision makes an unreasonable and arbitrary classification of milk dealers for the application of different prices to them, in contravention of the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States, and hence such provision

of statutory law is void and without effect, as to the plaintiff and as to its competitors.

Wherefore, defendants respectfully pray that the relief asked in the bill of complaint be denied, and that they be excused from further attendance upon the Court, and that the plaintiff be directed to pay them their costs herein incurred.

Henry S. Manley, Counsel to the Department of Agriculture and Markets and for the Milk Control Board; John J. Bennett, Jr, Attorney General of the State of New York, Solicitors for Defendants.

[fols. 40 & 40a] *Duly sworn to by Kenneth F. Fee. Jurat omitted in printing.*

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS

Now come the defendants and move that the bill of complaint be dismissed for the following reasons and upon the following grounds, applicable to both causes of action:

1. That it appears upon the face of the bill of complaint that the facts stated therein are insufficient to constitute a cause of action in equity.

2. That the same conclusions alleged above appear by the bill of complaint supplemented by certain facts of which this Court takes notice, particularly the statutes and data referred to in the affidavit of Kenneth F. Fee filed herein by the defendants.

Wherefore, for the reasons and upon the grounds aforesaid, the defendants respectfully move this Court that the bill of complaint herein be dismissed.

Henry S. Manley, Counsel for the Department of Agriculture and Markets and the Milk Control Board; John J. Bennett, Jr., Attorney General of the State of New York, Solicitors for the Defendants.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF KENNETH F. FEE

STATE OF NEW YORK,
Albany County:

Kenneth F. Fee, being duly sworn, deposes and says: I am Director of Milk Control and one of the defendants herein, and I have in my official custody the records and reports hereinafter referred to. I respectfuly allege the following facts showing that the relief prayed for herein by the plaintiff should be denied:

(A)

Chapter 158 of N. Y. Laws of 1933, known also as the Milk Control Law, was enacted as a result of a legislative investigation, and the official report of that investigation is found in 1933 Legislative Document No. 114. Because that report contains such material which may cast light upon questions now involved, leave is requested to present relevant excerpts in the brief of either party to this suit.

[fol. 43]

(B)

On or about May 1, 1933, the plaintiff duly verified and filed with the defendants an application for a milk dealer under the Milk Control Law. It appeared from that application that its business consisted principally of buying milk from producers at four country plants in New York State (Youngs Crossing, Maybury Mills, Kortright and Sheds) and selling it in bottles to stores and restaurants in New York City. The question in the application, "Do you agree to comply with all rules and orders hereafter made by the Milk Control Board?", was answered, "Yes". Thereafter a temporary permit was issued to it, and about June 22, 1933 a license was issued and has since been retained by it. This license recited upon its face that it was issued pursuant to the Milk Control Law, and was valid until March 31, 1934, unless sooner revoked. At about the same period under the same provisions of law several hundred competitors of the plaintiff were similarly licensed, and in general

they have obeyed the law and the orders of the defendant Board.

(C)

At various times since the Milk Control Law became effective the defendant Board has made orders purporting to fix minimum prices which the plaintiff and other milk dealers must pay producers for milk purchased, and minimum prices at which the plaintiff and other milk dealers can sell milk and cream for fluid consumptiou. The making of each order followed a public hearing upon reasonable notice and the plaintiff did not appear of record at any such hearing and oppose the making of the order, nor did it attempt to review any such order by certiorari.

[fol. 44] (D)

Under various orders of the defendant Board the minimum prices fixed for sales of quart bottles of Grade B milk in New York City from milk dealers to stores and restaurants were as follows:

April 17 to May 14	8 cents
May 15 to July 20	9 "
July 21 to date	10 "

However the Milk Control Law at Section 317, subdivision c, contains the following provision:

"It shall not be unlawful for any milk dealer who, at the time this act shall take effect, is engaged in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants, to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed by the board for such sales to stores in such a city."

On May 5, 1933, the defendant Board determined, by Order No. 12, that the phrase "well advertised trade name" in the above statutory provisions refers to milk handled by four dealers, as follows:

Bordens Farm Products Co., Inc.
Sheffield Farms Co., Inc.
Dairymen's League Co.
M. H. Renken Dairy Co.

All milk dealers in New York City were afforded an opportunity to name themselves or their competitors for inclusion in that list, and the plaintiff did not request inclusion of its name. Presumably the plaintiff, at all times since the order of the defendant Board were effective, fixing minimum prices upon sales from milk dealers to stores and [fol. 45] restaurants as above stated, has made its sales at prices one cent under the prices so fixed, and claims the privilege of so doing by reason of the statutory provision above quoted. The four companies named, on the other hand, have continued and are continuing to sell to stores and restaurants in New York City very substantial quantities of milk at the minimum prices specified in the orders of the defendant Board.

(E)

Under various orders of the defendant Board the minimum prices fixed for payment from milk dealers to producers for Class 1 milk (milk so marketed as to be used for fluid consumption) and for Class 2-A milk (milk so marketed as to be used for fluid cream) are as follows:

	Class 1	Class 2-A
May 16 to June 30	$1.88	$1.30
June 30 to July 30	1.88	1.31
July 21 to date	2.23	1.55

The price quoted in each case is for a hundredweight of milk testing 3.5 per cent butterfat delivered at a country plant 201-211 miles from New York City, and the price is subject to a freight differential for any greater or lesser distance, and to a butterfat differential for any greater or lesser test. The order in effect now and at all times since July 21, 1933, is Official Order No. 32 as amended by No. 34 (No. 49 amended it as to Grade A premiums, which are not now relevant) and a true and complete copy of that order is annexed hereto.

[fol. 46] (F)

The observance and enforcement of the orders fixing prices to producers are vital to the legislative plan em-

bodied in the Milk Control Law. In general those prices are being enforced successfully against all milk dealers, and no effort will be spared to accomplish that result.

It is true that about 30 per cent of the milk received at the Metropolitan Area (consisting of New York City, Newark and various suburbs and nearby cities) is supplied by producers outside of New York State. A table published by the United States Department of Agriculture, Bureau of Agricultural Economics, Market News Service, purporting to show receipts of milk at the Metropolitan Area for 1932 and 1933, segregated by months and by states of origin and by railroad and truck transportation, is referred to for relevant statistics, and I believe it to be correct. I deny that the defendants, "have recognized their inability to control the milk supply which thus comes into the State of New York from other states". On the contrary, the defendant Board is actively enforcing the provision of the Milk Control Law designed to deal with that problem (§ 312, subdivision g) by investigations, hearings and threats to revoke licenses. These enforcement measures have been successful in many cases and have resulted in additional payments to producers in other states for milk consumed in New York State. The defendant Board also is endeavoring to enforce the provision by suits for injunctions in the courts of New York State. Three such injunction suits have been pending undetermined since December 1, 1933, before Honorable Gilbert V. Schenck, Justice of Supreme Court.

Of the 30 per cent of milk received at the Metropolitan Market from producers outside of New York State, about half comes from Pennsylvania and about a third comes from New Jersey. In New Jersey there is and has been since May 1933 a Milk Control Board, organized under [fol. 47] Chapter 169 of N. J. Laws of 1933, which maintains prices to producers substantially as high as those maintained in New York State. For this and other reasons New Jersey producers are not a serious competitive force in the New York City market. Pennsylvania recently has organized a Milk Control Board, under Act No. 37, approved January 2, 1934. Both the New Jersey statute and the Pennsylvania statute substantially copy the provision quoted above from the New York statute, forbidding sale within the enacting state of milk bought too cheaply from

producers in another state. Besides that provision the Pennsylvania statute includes the following provision, and I am informed and believe that it will be enforced without any general exception or exemption by Pennsylvania authorities as to milk bought in Pennsylvania for sale in New York State:

"It is also declared to be the legislative intent that the producers of milk in this Commonwealth who sell their milk to milk dealers for shipment into and sale in another state, where prices to producers are regulated by a state board or other authority with powers substantially similar to the Milk Control Board established by this act, shall receive the same price that producers in such other state receive for milk purchased for similar purposes and under similar conditions, less a proper allowance for the transportation thereof. It shall be unlawful for any milk dealer, except in any cases in which the board shall otherwise determine, to pay to a producer within this Commonwealth, for milk to be sold in such other state, a price lower than that fixed by the state board or other authority in such other state for sale of milk in such other state for similar purposes and under similar conditions, minus a proper allowance for the transportation of the milk to the market in such other state."

[fol. 48] (G)

The plaintiff filed with the defendant Board reports required by its orders showing payments to producers for the months of May to September inclusive. It has failed and refused to file reports for October and subsequent months. The reports filed were examined by the Board's auditors, who discovered that the payments to producers apparently were incorrect in several respects, and too small. The plaintiff was given due notice of a hearing, which was held at Albany on September 14. Testimony was given under oath by three witnesses and made into a stenographic record. Various reports and other documents were made exhibits. The three witnesses were Benjamin Greenberg, president, Henry Breier, secretary, and Louis Lubitz, accountant, all officers and employees of the plaintiff. At that hearing the plaintiff was not represented

by counsel, but at a reopened hearing on November 13 it was represented by Mr. Rubinton of the firm now appearing for it. I presided. Additional testimony was given by Mr. Lubitz, and also by two auditors for the Board. On November 18 there was mailed to the plaintiff a computation purporting to embody the results of the evidence taken and to show that the plaintiff underpaid producers in the period May to September inclusive a total of $23,692.55. The plaintiff was requested to check that computation, and did so through its accountants, Samuel Heller & Company, of 1440 Broadway, New York City. The report of those accountants dated December 7 concedes underpayments totalling $5,628.68, claims that the plaintiff was entitled under its established practice (although not under any order of the Board) to deduct 15 cents per hundredweight for "hauling milk between plants", amounting to a total of $17,011.14, and accounts for the balance of $1,052.73 through a method of blending or averaging prices somewhat different from that used by the Board's auditors. [fol. 49] Thereafter the defendant Board made the orders which are annexed to the bill of complaint herein, and caused them to be served upon the plaintiff about January 1, 1934. Such orders constitute a determination of the matter, final unless the plaintiff sees fit to review by certiorari, and it has commenced no such proceeding.

It is respectfully represented that the plaintiff has not availed itself of its adequate remedy at law as to such matters; that it has not made the payments totalling $5,628.68 which its own accountants concede to be due; and that by agreeing to abide by orders of the Board and then seeking to underpay its producers in violation of such orders and withholding reports in recent months the plaintiff has disqualified itself to seek redress from a court of equity.

Kenneth F. Fee.

Sworn to before me this 8th day of February, 1934.
William H. Weller, Notary Public.

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF LAURANCE L. CLOUGH

STATE OF NEW YORK,
Albany County:

Laurance L. Clough, being duly sworn, deposes and says: I am employed by the defendant Board as its Chief Auditor, and have held that position since June 1, 1933. Previously I had assisted Dr. Leland Spencer in research as to the costs of milk distribution, the results of which research are found in 1933 Legislative Document No. 114.

I have examined the affidavit entitled herein verified by Benjamin Greenberg on January 26, 1934. I have given special attention to the costs of operation cited in that affidavit (pages 10 to 15 inclusive of typewritten affidavit).

In the first place it should be noted that cost figures for August 1933 as shown in Professor Spencer's report are not fairly comparable with costs from May 16 to July 21 or from July 21 to September 30. Professor Spencer in his report (mimeographed copy, pages 14-15) noted that there were some abnormal factors involved in August 1933 which may have tended to show unit costs higher than ordinary. If that is so, the fact that plaintiff's costs over a period of four and a half months are higher than those given by Dr. Spencer as an average for the single month does not neces-
[fol. 51] sarily prove that the plaintiff's costs are reasonable. What Dr. Spencer said about abnormal factors in August was as follows:

"The one month of August, however, was a period of vacation and reduced sales. This, together with declining volume of supply, tends to give somewhat higher unit costs and smaller profits for that month. Another factor which undoubtedly affected the results somewhat is the milk strike which lasted through the first ten days of August. This disturbance undoubtedly caused a considerable falling off in milk and cream received and in a few instances may have caused increased expenditures for protection and transportation."

In the second place various circumstances and conflicting data indicate to me that plaintiff's costs are not really as

high as they are represented to be in the affidavit made by Mr. Greenberg. I note on page 13 of the affidavit that the total operating cost from May 16th to July 21st is given as $1.5738, and from July 21st to September 30th as $1.5778 per can. It appears that the only variation in these costs is due to an increase of $.004 in the cost of bad debts. It does not appear reasonable that costs for all other items entering this total operating cost should be identically the same during these two periods. It also seems to me highly improbable that they have been able to make an allocation of costs for the exact periods which they have given, namely, May 16th to July 21st and July 21st to September 30th. It would be a most difficult task to split such items as payroll items and other costs to obtain such costs for a portion of a month.

It is to be noted that on page 10 of the affidavit, Item A, "Cost of Milk to Plaintiff", (after May 16th and to July 21st, 1933), the plaintiff states as follows: "The milk purchased by plaintiff averaged and still averages 3.6% butterfat content. The price fixed by defendants from May 16th to July 21st, 1933, was $1.88 per hundred pounds for 3.5% butterfat plus 4¢ per hundred pounds for each 1/10 of 1% of butterfat content. The price of one hundred [fol. 52] pounds of such 3.6% butterfat milk would be $1.92 and the cost of a can of milk containing 85 pounds is 85/100 of $1.92 or $1.632." Upon the basis of information given in the reports filed by the plaintiff with the Milk Control Board and from testimony given at the hearing held for the plaintiff, I have computed that on the basis of Class 1 prices set by the Board, the average price that would have been paid at the various plants operated by the plaintiff during the period May 16th through July 21st should be $1.593. This cost per can is $.039 lower than the price given by the plaintiff, and the difference is due to the fact that some of the plants operated by the plaintiff are outside of the 201-210 mile zone, and also due to variations in butterfat content from 3.6%.

The plaintiff on page 6 of his affidavit states that "All the purchases made by the plaintiff are made within the territory known as the 200-210 mile zone, this being the distance of such territory from New York City." I believe that the plant at Maybury Mills is in the 231-240 mile zone; the plant at Youngs Crossing in the 241-250 mile

zone; the plant at Kortright Station in the 176-180 mile zone; and the plant at Sheds Corners in the 251-260 mile zone. Therefore, the price to be paid to the producers for milk in three of these zones is less than the price set forth by the plaintiff for the 201-210 mile zone due to the freight differential which is allowed to be deducted in our Official Orders 17 and 32.

The plaintiff also states further that for the period from July 21st to September 30th, 1933, the cost per can of milk was $1.99325. I have found that the cost at the plants operated by the plaintiff for Class 1 milk during this period should be $1.9703, indicating a difference of $.02295. This difference is also due to the fact that some of the plants operated are outside of the 201-210 mile zone and also due to variation in the butterfat content of the milk.

[fol. 53] Mr. Duerr, our auditor, under my supervision, obtained from the books and records of the Hegeman Farms Corporation, certain figures representing the cost of operating their business during the months from April to September, 1933. Mr. Duerr gave testimony regarding these costs at the hearing held for the Hegeman Farms Corporation and later went over these figures with Mr. Lubitz, Accountant for the Hegeman Farms Corporation. He made certain corrections as per his letter of November 20th, 1933.

Mr. Duerr found that the cost of operating the business of the plaintiff as indicated by their records and accounts was for the month of May, $31,897.49; for the month of June, $31,056.68; for the month of July, $29,558.76; for the month of August, $32,943.01; and for the month of September, $26,431.00. Taking these costs and dividing them by the amount of milk handled during each of these months gives a cost per hundred pounds of $1.2563 for May; $1.1006 for June; $1.2723 for July; $1.5507 for August; and $1.0053 for September. For the months from May to September, inclusive, the total costs were $151,886.94 or $1.22122 per hundred pounds, or $1.038 per can. These costs include cost of operating the creameries, cost of operating the city plants, the delivery cost, general and overhead costs and freight costs, and are given in detail on the sheets prepared by Mr. Duerr. These costs also include items of considerable size for depreciation. It is submitted that the costs as given by the plaintiff far exceed these costs as determined by examination of their records.

On page 10 of the affidavit submitted by the plaintiff, he states as follows: "My Company sells practically all of the milk purchased by it for consumption as fluid milk. A very negligible amount, not more than one per cent of the milk, is sold as fluid cream. The figures I am setting forth are calculated without taking into consideration the sales of fluid cream since such sales are so trifling in amount as to have no effect in the calculation." I have examined the re-
[fol. 54] ports as submitted by the plaintiff and also testimony given at hearings, and I find that for the period of May 16th through September 30th, inclusive, the plaintiff received at its country plants, 11,340,762 pounds of milk. Of this amount, there was reported to have been sold in the form of fluid cream, 1,336,615 pounds of this milk, or 11.8%. There was also sold in the form of cream classified as Class 2-C, 135,020 pounds, somewhat over one per cent of the total amount received, so that of the total amounts received, 12.98% was sold in other forms than fluid milk. This does not appear to be very negligible.

Laurance L. Clough.

Sworn to before me this 8th day of February, 1934.
William H. Weller, Notary Public.

[fol. 55] EXHIBIT TO AFFIDAVIT OF KENNETH F. FEE

State of New York, Department of Agriculture and Markets

Milk Control Board

In the Matter of Fixing Minimum Prices to Be Paid by Milk Dealers to Producers and Others for Milk

Official Order No. 32, as Amended by Official Order No. 34

Such investigations and proofs as the emergency permits having been made, and public hearing having been had after reasonable notice to the public generally through newspapers and otherwise, and due deliberation having been had, it is hereby ordered:

1. For the purposes of this order milk is classified as to its uses, into nine classes, as follows:

(a) Class 1 milk is defined as including any milk purchased or received or handled by a milk dealer and so marketed as to be readily open to the supposition that it will find its ordinary utilization by human consumption as raw or pasteurized milk. It includes all milk leaving a milk plant or receiving station in fluid form, in the absence of clear proof that such milk is so utilized as to fall into some other class. It also includes all milk utilized in any manner not included within the classes defined hereinafter.

In the case of a dealer who receives or handles not more than fifteen hundred forty-quart cans of milk (or its equivalent) per month, any part of which is Class 1 milk, at least seventy-five per cent of all milk (or its equivalent) received or handled by him shall be included in Class 1, and the remainder in Class 2-A.

(b) Class 2-A milk is defined as including any milk purchased or received or handled by a milk dealer and so marketed as to be readily open to the supposition that it will find its ordinary utilization as fluid cream. It includes all milk made into sweet or sour cream and leaving a milk plant or receiving station in such form, in the absence of clear proof that such milk is so utilized as to fall into some other class.

(c) Class 2-B milk is defined as including any milk purchased or received or handled by a milk dealer and so marketed as to be readily open to the supposition that it will find its ordinary utilization as plain condensed milk and in certain forms of cheese. It includes milk made into plain condensed milk, all milk used in the manufacture of cheeses of the soft type, such as Neufchatel, Pimento, Pimento Olive, D'Isigny, Port DeSalut, Lunch, Kosher, Petit Suisse, etc., and any other cheese except those specified by names in Classes 3 and 4-B.

(d) Class 2-C includes all milk used in the manufacture of ice cream in New York City and milk from which is derived fresh or storage cream and unsweetened condensed milk, used in the manufacture of ice cream in New York City. It also includes milk from which is derived storage cream used in the manufacture of sour cream.

(d-1) Class 2-D includes all milk used in the manufacture of ice cream outside of New York City and milk from which

is derived cream and unsweetened condensed milk used in the manufacture of ice cream outside of New York City.

[fol. 56] (d-2) Class 2-E includes all milk from which is derived fresh or storage cream used in the manufacture of cream cheese.

(e) Class 3 milk includes milk which is used in the manufacture of sterilized and evaporated whole milk, sweetened whole condensed milk, milk chocolate, whole milk powder, powdered malted milk; also all milk to which milk fat is added that is used in the manufacture of milk powder; also all milk that is used in the manufacture of Cream, Swiss, Limburger, Munstor, Pineapple, Edam, Gouda, De Brie, Camembert, Hard Italian, Brick, Farmers Pressed Cheese, Cottage Cheese and other cheeses of similar type.

(f) Class 4-A milk shall include all milk that is made into butter.

(g) Class 4-B milk shall include all milk that is made into American Cheese.

2. It shall be presumed, in the absence of clear proof to the contrary, that any milk purchased or received or handled by a milk dealer, except at a plant or receiving station engaged continuously and solely in manufacturing the milk, leaves such plant or receiving station in fluid form.

3. It shall likewise be presumed, in the absence of clear proof to the contrary, as to any milk dealer buying milk within the State of New York, and also buying elsewhere, that all milk marketed or utilized within the State in Class 1 is milk purchased within the State to the full amount available therefore, and likewise as to each successive lower class.

4. The prices hereinafter established shall not apply to milk sold to the state or any municipality or to the federal government upon bids, but any milk dealer claiming exemption under such provisions shall make written and verified application for such exemption, in form satisfactory to the Board, if possible before purchasing or receiving or handling the milk as to which exemption is claimed.

5. The Board will establish by this order, and may from time to time change by other orders or by amending orders, a base price for Class 1 milk. Such base price shall be based upon delivery of one hundred pounds of milk containing 3.5% of milk fat to a milk plant or receiving station at a railroad point 201-210 miles distant from New York City. No off rail differential shall be allowed except as specially authorized by the Board. Such base price shall be subject to certain differentials, as follows, all or any of which may apply to a specific transaction:

(a) Freight differential. The actual price for Class 1 milk marketed for consumption in New York City or in the counties of Rockland, Westchester, Nassau and Suffolk is ascertained by adding to the base price at the 201-210 milk freight zone 53¢ per 100 pounds, and deducting from the result thereby obtained the actual freight rate applying per 100 pounds of milk from there to New York City, but there shall not be deducted an amount in excess of 59½¢ per 100 pounds. A schedule hereto annexed indicates the freight differential which is to be applicable until further notice. There shall be no freight differential for Class 1 milk marketed for consumption elsewhere in the State than in New York City or in the counties of Rockland, Westchester, Nassau and Suffolk. Milk received or handled at a milk plant or receiving station less than 200 miles from New York City shall be presumed to be marketed for consumption in New York City or in the counties of Rockland, Westchester, Nassau and Suffolk, in the absence of clear proof to the contrary.

[fol. 57] (b) Milk fat differential. The actual price is ascertained by adding to the base price in the case of milk testing more than 3.5%, or subtracting from the base price, in the case of milk testing less than 3.5%, four cents per 1/10th of 1% of milk fat.

(c) Grade A. differentials. Milk which is qualified under the New York City Department of Health requirements for sale as Grade A, and which is delivered to plant similarly qualified, shall have added to the base price the following differentials:

Butterfat	10,000 or less bacteria colonies per c. c.	10,000 to 25,000 bacteria colonies per c. c.
3.0	.10	.50
3.1	.15	.075
3.2	.20	.10
3.3	.25	.15
3.4	.35	.20
3.5	.40	.25
3.6	.45	.30
3.7 and above	.50	.35

No increased differential for additional points of butterfat above 3.7%. Existing arrangements between any co-operative association and milk dealers buying through it from its producer members, affecting Grade A differentials, may be continued.

6. The base price established by this order for Class 1 milk is $2.23.

7. The board will establish by this order, and may from time to time change by other orders or by amending orders, a base price for Class 2-A milk. Such base price shall be based upon the delivery of one hundred pounds of milk containing 3.5% of milk fat to a milk plant or receiving station at a railroad point 201-225 miles distant from New York City. Such base price shall be subject to certain differentials, as follows, all or any of which may apply to a specific transaction:

(a) Freight differential. The base price shall apply to all points 201-225 miles, both inclusive from New York City, with 1¢ per 100 pounds of milk added for every 25 mile zone under 201 miles, and 1¢ per 100 pounds of milk deducted for every 25 mile zone over 225 miles.

(b) Milk fat differential. The same differential provided for Class 1 milk shall apply to Class 2-A milk also.

(c) Grade A differential. The same differential provided for Class 1 milk shall apply to Class 2-A milk also.

8. The base price established by this order for Class 2-A milk is $1.55.

9. The Board will establish by this order, and may from time to time change by other orders or by amending orders,

a base price for Class 2-B milk. Such base price shall be based upon delivery of one hundred pounds of milk containing 3.5% of milk fat to milk plant or receiving station at a railroad point 201-225 miles distant from New York City. Such base price shall be subject to the same differentials provided for Class 2-A milk.

10. The base price established by this order for Class 2-B milk is $1.75.

11. The Board will establish by this order, and may from time to time change by other orders or by amending orders, a base price for Class 2-C milk, a base price for Class 2-D milk, and a base price for Class 2-E milk. Such price in each case shall be based upon deliveries of one hundred pounds of milk containing 3.5% of milk fat to a milk plant or receiving station at a railroad point 201-225 miles distant from New York City. Such base price in each case shall be subject to the same differential provided for Class 2-A milk.

[fol. 58] 12. The base price established by this order for Class 2-C milk is $1.45.

The base price established by this order for Class 2-D shall be not less than 25 cents more than the price determined for Class 4-A.

The base price established by this order for Class 2-E shall be not less than 20 cents more than the price determined for Class 4-A.

13. The price for Class 3 milk shall be the average paid at mid-west condenseries, as determined by the Board at the end of each month, plus not less than 10¢ per hundred pounds of milk, the milk fat differential to be figured upon a direct ratio between milk fat content and price. The prices above fixed apply to all points 201-250 miles, both inclusive, from New York City, with 1¢ per 100 pounds of milk added for every 50 mile zone under 201 miles, and 1¢ per 100 pounds of milk deducted for every 50 mile zone over 250 miles.

14. The price for Class 4-A milk shall be determined for the month during which the milk is handled, by taking the official New York average outside quotations for 92 score butter, deduct four cents a pound for making, and figure an overrun of 16%.

15. The price for Class 4-B milk shall be determined for the month during which the milk if handled, by taking the average of the weekly quotations per pound of cheese with differentials as indicated at the following markets, or of the quotation with differentials as indicated from such of these markets as may issue quotations during the period: Single daisies at Wisconsin Cheese Exchange, Plymouth, Wisconsin, plus one cent per pound; Twins at Gouverneur Cheese Board, Gouverneur, New York; Flats at Cuba Board of Trade, Cuba, New York. From the average price of cheese as determined from these quotations and differentials shall be deducted three cents per pound of cheese allowance for making, and the price per 100 pounds of milk shall be computed according to the yield of cheese per 100 pounds of milk, as follows:

B. F. test	Cheese yield	B. F. test	Cheese yield	B. F. test	Cheese yield
3.0%	8.30	4.0%	10.60	5.0%	12.90
3.1%	8.53	4.1%	10.83	5.1%	13.13
3.2%	8.76	4.2%	11.06	5.2%	13.36
3.3%	8.99	4.3%	11.29	5.3%	13.59
3.4%	9.22	4.4%	11.52	5.4%	13.82
3.5%	9.45	4.5%	11.75	5.5%	14.05
3.6%	9.68	4.6%	11.98		
3.7%	9.91	4.7%	12.21		
3.8%	10.14	4.8%	12.44		
3.9%	10.37	4.9%	12.67		

16. The prices hereby established shall be the minimum prices to be paid by milk dealers to producers and their representatives for milk of the respective classes mentioned; provided, that the prices hereby established shall not apply to purchases by a milk dealer who does not purchase or handle any Class 1 or Class 2 milk. From and after the effective date of this order, and until the Board orders otherwise, no milk dealer shall purchase or receive or handle milk unless payment is made to the producer, or to a cooperative corporation organized or operated under or subject to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing of milk for the producers thereof, for the benefit of its producers, at a rate not less than the rates hereby established. Such payment shall be made in cash or by check not more than forty-six days after delivery of the milk from the producer or on his behalf. Such payment shall be based upon the aggregate of milk received at the plant or receiving station from all producers during the period covered by the payment, except that the Board may, by special permit to specific milk dealers, authorize them to base payment upon

the aggregate of milk received at several plants or receiving stations which are operated together for marketing purposes, or make other special provision. Where some milk included in the payment is of two or more different classes the payment shall be at a rate which will truly represent the proportions of each.

[fol. 59] 17. No milk dealer shall buy or offer to buy milk at any price less than the price hereby established applicable to such transaction and no method or device shall be employed whereby milk is bought or offered to be bought at any lesser price, whether by any discount, or rebate, or excessive charge of hauling or other service, or any other method or device whatsoever. Any method or device which is employed in an effort to defeat the intent of this order as well as any direct violation of it, will be deemed sufficient cause to suspend or revoke the license of the offending milk dealer without further or specific warning.

18. Not later than the 12th day of each month, except as the Board may otherwise provide in special cases, every milk dealer shall file with the Board a report covering individually each milk plant or receiving station operated by him, except as the Board may otherwise provide in special cases, giving in detail covering the preceding month the following information:

(a) Name of dealer and location of plant.
(b) Total amount of milk received from all sources.
(c) The average price per hundred pounds of 3.5 milk delivered at the plant, computed according to the prices established by this order and any amendment thereof.
(d) Whether payment is made by the dealer directly to producers, or to a co-operative association, and upon what date or dates payment will be made.
(e) Number of producers.
(f) Total amount of milk utilized under each of the various classes and the price for each such class.

Such report shall be in a form to be prescribed by the Board and shall be sworn to by the milk dealer, or by a responsible and well informed officer or employee acting for him. The milk dealer shall keep available at this office, if a regular office is maintained separate from the milk plant or receiving station, and otherwise at such plant or station, for at least one year after filing such reports, the books of account and other records upon which it is based, which shall

be in form readily to substantiate and afford a check upon the information contained in the reports. Such records shall include the full name and post office address of each individual producer from whom the dealer has received milk, together with his serial number, the number of pounds of milk received from each individual producer, and the milk fat tests as determined by the dealer. Such records shall also include records of every shipment and sale of any milk or milk product from the milk plant or receiving station.

19. This order (as amended by Official Order No. 34) shall take effect at 1 A. M., Eastern Standard Time on Friday, July 21, 1933.

Milk Control Board, Charles H. Baldwin, Thomas Parran, Jr., Kenneth F. Fee.

Dated at Albany, N. Y., July 19, 1933.

[fols. 60 & 60A]

Zone Prices and Freight Differential
Official Order No. 32 as Amended by Official Order No. 34

Miles	Freight rate 40-quart can Class 1 milk	Freight allowance per 100# Class 1 milk	Miles	Freight rate 40-quart can Class 1 milk	Freight allowance per 100# Class 1 milk
10 or under	$.20	$.235	201–210	$.385	$.455
11–20	.21	.245	211–220	.40	.47
21–25	.225	.265	221–225	.405	.475
26–30	.225	.265	226–230	.405	.475
31–40	.235	.275	231–240	.41	.48
41–50	.25	.295	241–250	.41	.48
51–60	.26	.305	251–260	.425	.50
61–70	.27	.32	261–270	.43	.505
71–75	.28	.33	271–275	.435	.51
76–80	.28	.33	276–280	.435	.51
81–90	.29	.34	281–290	.44	.52
91–100	.30	.355	291–300	.45	.53
101–110	.305	.36	301–310	.455	.535
111–120	.315	.37	311–320	.46	.54
121–125	.325	.38	321–325	.465	.545
126–130	.325	.38	326–330	.465	.545
131–140	.335	.395	331–340	.475	.56
141–150	.34	.40	341–350	.48	.565
151–160	.355	.42	351–360	.485	.57
161–170	.355	.42	361–370	.49	.575
171–175	.365	.43	371–375	.495	.58
176–180	.365	.43	376–380	.495	.58
181–190	.375	.44	381–390	.50	.59
191–200	.385	.455	391–400	.505	.595

NOTE: The above applies to all points except those shown on the following list from which points the Railroads have different rates as indicated.

Auburn, N. Y.	.455	.535	Newark Valley N. Y.	.41	.48
Belle Meade, N. J.	.30	.35	Owego, N. Y.	.41	.48
Dryden, N. Y.	.41	.48	Spencer, N. Y.	.41	.48
Locke, N. Y.	.45	.53	Waterville, N. Y.	.41	.48
Moravia, N. Y.	.45	.53			

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF BENJAMIN GREENBERG

STATE OF NEW YORK,
City of New York,
County of Kings, ss:

Benjamin Greenberg, being sworn, says:

I am president of plaintiff and I submit this additional affidavit in support of the motion made herein for a temporary injunction, and particularly with reference to some of the statements made in the opposing affidavit.

I

Defendants point out in their answering affidavits that when plaintiff applied for a license as a milk dealer under the present Milk Control Law, that the application which it signed contained an agreement to comply with the rules and orders made by defendants. The application for the license made by plaintiff cannot in any sense be deemed to have been a waiver of plaintiff's right to test the constitutionality of the statute, for the application was made not voluntarily but by compulsion of the statute itself, since it was practically impossible for plaintiff to attempt to carry on its milk business without a license. The consequence would have been the immediate halting of plaintiff's activities by the New York State officials, for pro-
[fol. 62] ducers would not have been permitted to sell to an unlicensed dealer and storekeepers would not have been permitted to purchase from an unlicensed dealer. The necessary result would have been the destruction of plaintiff's business and the consequent destruction of a large part of the value of its properties, even though the law had ultimately been deemed invalid in any litigation brought by plaintiff to test the right of the state officials to prevent plaintiff from carrying on its operation without a license.

Furthermore, the application made by plaintiff can have no relevancy to the attack made by plaintiff on the validity of the price fixing orders made by defendants, and of

the order revoking plaintiffs' license, which is based on the price fixing orders. An agreement to comply with orders to be made by defendants certainly would not contemplate an obligation to comply with unconstitutional orders, for such orders are void and cannot be considered as orders at all for any legal purpose.

II

Defendants urge that plaintiff made no attempt to review the orders of defendants by certiorari. There is no merit in this objection. This court has full jurisdiction to protect the rights of plaintiff in so far as they are rights which are guaranteed by the Federal Constitution, and the only basis upon which this court's jurisdiction has been invoked is that plaintiff's rights under the Federal Constitution have been violated by the statute and the defendants' orders. Because plaintiff might have sought remedy by a certiorari proceeding in the state court in no way deprives this court of its well settled jurisdiction to grant equitable relief when the acts of a state official under [fol. 63] an unconstitutional state law or under an unconstitutional administrative order threaten irreparable injury to an aggrieved party.

Moreover, plaintiff could not have sought the full relief which it seeks in this court by any certiorari proceeding for plaintiff in a certiorari proceeding could only review the jurisdiction of the defendants as defined by the statute itself and the validity of the orders made by the defendants under the statute and could not attack the constitutionality of the statute. Likewise in a certiorari proceeding plaintiff would be limited to a review of the past acts of defendants and could not obtain relief against enforcement of the statute in the future, which is part of the relief sought in the within litigation.

III

The opposing affidavits state that all milk dealers in New York City were afforded an opportunity to name themselves or competitors for inclusion in the list made up by defendants of "well advertised" trade names. The plaintiff has no well advertised name and the milk itself is not sold under any well advertised name. Plaintiff does no ad-

vertising at all, so that even had they sought to be named as one of those coming within the category of well advertised trade names, their attempt would have been futile, for defendants certainly do not take the position that any dealer could have been placed in the category of having a well advertised trade name, merely by applying for inclusion, irrespective of the actual fact.

In defendants' answer the plea is made that the portion of the statute which permits sellers of non-advertised milk to charge one cent less than sellers of advertised milk, [fol. 64] creat-s an unreasonable and arbitrary classification of milk dealers and is unconstitutional under the Fourteenth Amendment.

It is of course extremely doubtful whether defendants who are state officials charged with the duty of enforcing a statute passed by the instrumentality of the state may themselves urge that the statute is unconstitutional. Certainly, defendants did not deem the statute unconstitutional when they made their orders, for in their orders of May 11, 1933, Official Order No. 16 and July 16, 1933, Official Order No. 35, defendants expressly provide, that dealers selling non-advertised milk could sell such milk at a price of one cent per quart below the price of milk sold under the well advertised trade names.

Defendants in pleading that the statute is invalid in so far as it makes a distinction between dealers who sell advertised and unadvertised brands, seemingly take the position that the plaintiff would have been and is bound by the same price which defendants fixed for the vendors of advertised brands. This would mean that the minimum price at which plaintiff could sell its milk would be the same minimum price at which the sellers of advertised brands, such as Sheffield's or Borden's, sell their milk. If the statute has the meaning which defendants thus ascribe to it, then the statute would operate so as to destroy the business of plaintiff, for plaintiff could not sell any milk at all if it could only sell at the same price as dealers who sell well advertised brands. As between milk offered at the same price, it is manifest that buyers would take only the well known brands even though, as is the case with milk, there is no difference in quality, by reason of the strict health regu-

[fol. 65] lations of the state and city. The result of the statute as interpreted by defendants in their answer would be an almost complete ending of the demand by consumers for any but well known brands of milk, since there would be no price advantage in buying the unknown brand of milk. If defendants' position was sustainable therefore, the result of the statute would be the destruction of the business of the independent dealers of the state and a creation of a monopoly in favor of the few dealers of well known brands.

IV

The opposing affidavits state with reference to the problem of the milk which is imported into the State of New York from other states, that statutes have been enacted in other states similar to those in New York for the purpose of maintaining high prices for producers, and that in the case of one statute, there is a provision which fixes the price of milk purchased to be shipped into another state at the same price as the purchase price of milk in the state into which the milk is to be shipped.

The adoption of statutes in other states can in no way affect the problem of the milk coming into New York from outside this state, for in the states adjoining New York, there is a great surplus of production, so far as any local demand is concerned, and the milk produced can only be sold for shipment into the State of New York and for use in New York City. The fixation of prices in these other states cannot aid the local producer who is unable to sell his product excepting for shipment into New York. Such sale will be a part of interstate commerce, and the various states which supply New York City with milk can no more regulate this interstate commerce by fixing prices at which milk may be sold for shipment into New York, than the [fol. 66] State of New York can regulate the price at which milk may be purchased for the purpose of being brought into New York. Both are attempts to impose a direct burden on interstate commerce.

The opposing papers deny that defendants have recognized their inability to control the milk supply which comes into New York from other states. This statement is directly contrary to all of the reports which have appeared in the current press and which are apparently authentic. In addition to the statements which are referred to in

plaintiff's moving papers, I refer the court to a statement which appeared in the New York Evening Post of February 9, 1934, which is an account of a meeting of milk producers held at Syracuse. The article reads in part:

"They listened intently to Charles H. Baldwin, State Commissioner of Agriculture and chairman of the State Milk Control Board, and Fred H. Sexauer, president of the Dairymen's League, who told them that the whole price structure of the milk business is on the point of collapse.

"Only an effective Federal agreement, and that forthcoming promptly, can avert chaos, they were told."

V

The opposing affidavits state that the price paid by plaintiff to producers for its milk is properly calculated for the period up to July 21st at $1.593 instead of $1.632 as set forth in the moving papers. This is a difference of $.039 a can of milk, and since according to plaintiff's figures, it sustained a loss during the period of $.0458 a can, it would be immaterial, if there were no other factors to consider, whether the price paid for milk was that stated in plaintiff's papers or that stated in the opposing papers, for in either case, there would be no return at all to plaintiff.
[fol. 67] The same is true with the period from July 21st to September 30th, in which the moving papers fix $1.99325 per can as the cost per can to plaintiff and in which the opposing papers fix the price at $1.9703, a difference of $.02295 per can. According to the moving papers the operating loss during the July 21st to September 30th period, was $.01605 a can, so that if no other factors were involved, the only difference between plaintiff's and defendants' figures would be that plaintiff would be making $.0069 a can, an infinitesimal operating profit, which could not possibly offer plaintiff a fair return.

The opposing papers however, assert that plaintiff's actual operating costs are less than stated in the moving papers. The opposing affidavits urge that it is improbable that plaintiff was able to allocate costs for the exact periods between May 16th and July 21st and from July 21st to September 30th. In preparing the figures with reference to this operating cost per can, plaintiff made no attempt to allocate costs in the manner assumed by the opposing affidavits. The figures set forth are calculated upon the entire

period from May to September inclusive, which method of calculation was entirely proper, since the operating costs during that entire period were uniform, for there was no change in labor cost, in freight cost or in charges to depreciation nor in overhead expenses. The figures in the moving papers are based upon the total operating costs and the total sales for the May to September period, and for this reason the operating costs, with the exception of bad debts, are identical for the May 16th to July 21st and from the July 21st to the September 30th period.

The opposing affidavits urge that plaintiff's sales of [fol. 68] cream are not trifling in amount for the purpose of calculating operating expenses and point out that approximately twelve per cent of the milk purchased by plaintiff was purchased for the purpose of resale as fluid cream. This overlooks that the plaintiff in processing milk into cream must use from five and one-half to eleven quarts of milk to make one quart of cream, dependent upon whether the cream is light, heavy or medium in grade. The actual quantity of cream handled is therefore only between one and two per cent of the total volume of sales made by plaintiff, although the milk purchased for the purpose of making cream amounts to eleven or twelve per cent of the total purchases of milk. Plaintiff's business therefore consists in its ultimate analysis of ninety-eight to ninety-nine per cent of milk sales, so that in the calculations made for the purpose of estimating operating expenses, the sales of cream could properly be disregarded.

The operating costs as set forth in the moving papers were prepared by Mr. Louis Lubitz, the accountant for plaintiff, after he had made an analysis of plaintiff's records. Mr. Lubitz is not in the exclusive employ of plaintiff, but carries on a general accounting practice.

Defendants' affidavits set forth figures showing operating costs for plaintiff's business, lower than those set forth in the moving papers. These opposing affidavits were served on Saturday, February 10th, 1934, and I have not had an opportunity to obtain from Mr. Lubitz the detailed figures upon which he made his calculations of operating costs. If the court desires these detailed figures in connection with the present application, I respectfully ask for an opportunity to submit them after the hearing of the [fol. 69] argument.

The opposing papers point out that in Professor Spencer's report he states that there were abnormal factors involved in August 1933 which affected operating expenses. The abnormal expenses referred to in the Spencer report were a milk strike of New York State producers and decreased volume of sales by reason of the month being a vacation period. So far as plaintiff's own business is concerned, these factors in no way affected its volume of sales, and its operating costs for the month of August were with possible inconsequential variations the same as those for the other months within the period of May to September. Plaintiff's average operating costs during the entire year are moreover higher than those shown in the moving papers for the period of May to September, since the cost of operating per unit of sales is higher in the winter months than it is in the summer months.

The factors referred to in Professor Spencer's report may have affected the operating costs per unit for the month of August for some wholesale dealers but the greatest result of these factors could not have been to increase operating costs per unit more than a few cents per can of sales, so that even taking into consideration the special circumstances that existed during the period covered by the Spencer report, his report nevertheless demonstrates that plaintiff's operating expenses are fair and reasonable.

Benjamin Greenberg.

Sworn to before me this 12th day of February, 1934.
M. H. Coleman, Notary Public, Kings Co.

[fol. 70] In United States District Court, Southern District of New York

Hegeman Farms Corporation, Plaintiff,

against

Charles H. Baldwin, Thomas Parran, Jr., and Kenneth F. Fee, as Members of the Milk Control Board of the State of New York, Defendants

Before L. Hand, Circuit Judge; Bondy and Patterson, District Judges

Upon return to an order to show cause why an injunction pendente lite should not issue. Upon motion by the defendant to dismiss the bill.

Samuel Rubinton for the plaintiff.
Henry S. Manley for the defendants.

OPINION

L. HAND, Circuit Judge:

The decision of the Supreme Court on March 5, 1934, declaring constitutional the "Milk Control Law" of New York, (Chapter 158 of the Laws of 1933), has answered the first cause of suit alleged in this bill of complaint. The court there held that the regulation of the price of milk by the "Milk Control Board" was lawful, and that its orders could be enforced. The second cause of suit remains, which is that the Board has in administering this law deprived the plaintiff of its property without due process of law, because its license will be revoked unless it repays to those who sold it milk the difference between the price fixed by the Board and lower prices at which it [fol. 71] bought. The Board had fixed minimum prices not only for the purchase of milk, but for the plaintiff's sales to its customers, shops and restaurants in New York; and it alleges that, though in form only a minimum, this selling price was in effect a maximum price due to the keenness of the competition between wholesalers. The result has been that the "spread" between what the plaintiff must pay and what it can get, is so small that it can earn nothing upon its very substantial capital invested in the business. This takes away its property under the Fourteenth Amendment. The prayer of the bill is to enjoin the execution of two orders of the Board; one, dated December 29, 1933, which revoked its license under § 308 (3), and which was to become effective January 31, 1934; the other, dated December 30, 1933, which suspended this revocation provided that before January 31, 1934, the plaintiff paid to those of whom it bought milk the difference above mentioned. Since proceedings by certiorari in the Supreme Court of New York are wholly judicial in character, People v. Wilcox, 194 N. Y. 383, this court, constituted under § 266 of the Judicial Code, has jurisdiction over the suit, regardless of the completeness of that proceeding as a remedy. Bacon v. Rutland R. R. Co., 232 U. S. 134; Prendergast v. N. Y. Telephone Co., 262 U. S. 43; R. H. Commission vs. Duluth St. Ry. Co., 273 U. S. 625. There is moreover ground for

equitable intervention, because the money which the plaintiff is required to pay will be distributed among numerous milk farmers from whom recovery will probably be impossible, and certainly impracticable at any cost which would justify the effort. We are therefore obliged to decide the merits of the second cause of suit.

[fol. 72] Although during the period in question, there had been, as we have said, a minimum selling price, the plaintiff cannot complain of that. If it wished to sell at a higher price, it always could, so far as any order of the Board went. If in practice the price could be pushed no higher than the minimum, the order was not responsible for that; it was the competition in the trade which kept down the price. We are not wholly clear whether the plaintiff means further to lay as a grievance the fixing of a purchase price for milk, regardless of any order touching its selling price, but we shall assume that the bill goes so far. That is the inverse of the usual situation, where the costs are left free but the sales price is fixed; the usual "rate case" of a "utility company", of which Smyth v. Ames, 169 U. S. 466, is the progenitor. In such situations it is impossible to change the costs, because they are not controlled by the company, and the regulation of the selling price puts it in a strait jacket. But when the cost of a prime raw material is fixed, unregulated manufacturers who must buy at that cost, will collectively try to impose the increase on the buyers. It is impossible à priori to foretell how far they will succeed. In some cases the trade may have been selling at margin enough to absorb the cost and still leave a profit; they may have to bear the loss among themselves. If they do, fixing the cost has not deprived anyone of his property, however comprehensively that notion be understood. On the other hand some selling units may have to be eliminated, the "marginal producers"; a reduction in production will follow and almost always a rise in price. Apparently it is this result which the plaintiff asserts to be a taking of his property. The [fol. 73] first effect may be to make all sell at a loss and there may be a marked lag before any adjustment, but plainly the loss cannot be permanent and general, or the trade will perish. The most that the plaintiff can ask of us is to assume that in the eventual accommodation it will prove one of the weak selling units and will go to the wall. We shall take the bill as going so far.

It must be apparent that such a doctrine will have wide effects. All sorts of regulations may affect the price of materials or machinery necessary to another industry. The elimination of fire hazards may require high rents; they may not be attainable. The observance of sanitary regulations in factories may be expensive; more than the market will bear. Conformity with prescribed standards of quality and packing may turn a living profit into a loss. Excise taxes are a part of manufacturing cost; the buyer cannot always be made to absorb them and the added load may drive out some producers. Workmen's compensation or a change in employers liability may prove the straw which breaks the camel's back. If the plaintiff be right, in every case the validity of the regulation would depend upon whether the addition to the cost resulted in the elimination of some of the producers. Legislation could scarcely go on at all if its indirect results, its final incidence, must be so nicely adjusted. Nor does it follow that it ought to be. Surely it is a mild assumption that the more vital interest in the end may demand that there should be less goods sold at higher prices, rather than that all existing manufacturers should remain in business. He would be a hardy exponent of non-interference who should assert the opposite to-day; if for instance the rise in cost was due to improvements in working conditions, or in the hygienic quality of [fol. 74] the product. The purpose served by fixing the price of a raw material may be as imperative as either of these; certainly it is not the function of a court to set the hierarchy of social values. In the past, it is true, there were at times expressions in the books which seemed to say that one kind of governmental purpose would justify interference where another would not. The "Police Power" was sometimes spoken of as though it concerned only "health and safety". That mode has disappeared; the purpose of the State of New York to preserve its dairy industry may involve remote repercussions as mortal to some individuals, as its purpose to abolish sweatshops; but once it be agreed that the state may interpose for either end in the "free play of supply and demand", the incidents follow. It is not critical that some will find themselves unable to withstand the pressure and will collapse.

So far as we can find, the plaintiff's argument has not hitherto been put forward; at least we are referred to no

decision which touches it, nor can we find any except a caveat in N. Y. Central R. R. Co. v. White, 243 U. S. 188, 205, that compensation awards might become too "onerous" to be "supportable". It is dangerous to deal in universals, especially in constitutional law, and it might be too much to say that no minimum price could be too high, even though it ruined the whole of other industries, and was quite unnecessary to the protection of that for which it was fixed. The bill lays no such case; it merely alleges that the plaintiff cannot make any money by selling milk bought at the minimum fixed by the Board. Just as it is exposed to the rubs of competition in what it buys on an uncon- [fols. 75 & 76] trolled market, and must make such fetch to adjust as it can, so it must accommodate its dealings to a price fixed, as we now know, in the plenitude of municipal power. That power once granted, its transmitted disturbances the Fourteenth Amendment does not neutralize.

Order to show cause discharged.

Bill dismissed.

[fol. 77] In United States District Court

[Title omitted]

Findings of Fact

1. This is a suit of civil nature in equity, between citizens of the same state, which arises under the Constitution of the United States, and the matter in controversy exceeds three thousand dollars exclusive of interest and costs.

2. Plaintiff is a domestic corporation of the State of New York, engaged in that State in buying milk from producers and reselling it at wholesale in New York City as cream and Grade B milk.

3. The defendants consitute the Milk Control Board created by Chapter 158 of New York Laws of 1933. They maintain a business office in the Southern District of New York.

4. This suit is brought to enjoin the defendants from enforcing against the plaintiff certain orders made by the defendants under alleged authority of the statute above

mentioned, upon the ground that such statute and also such orders confiscate plaintiff's property without due process of law and deprive plaintiff of the equal protection of the law, all in violation of the Fourteenth Amendment of the [fol. 78] Constitution of the United States.

5. Plaintiff is the owner of properties used in its milk business and valued at more than $450,000.00.

6. On or about June 22, 1933, there was duly issued to the plaintiff a license as a milk dealer pursuant to the statute above mentioned.

7. Under the aforesaid statute defendants are empowered to fix by order the maximum and minimum wholesale and retail prices to be charged and paid for milk handled within the State of New York for fluid consumption, and in the event that plaintiff offer to purchase or purchase or offer to sell or sell fluid milk at prices less than or more than the price fixed by defendants, the defendants are empowered to suspend or revoke the plaintiff's license to carry on the business of milk dealer.

8. Defendants have made orders dated December 29 and 30, 1933, whereby they determine that plaintiff has underpaid its producers for milk delivered during the months May to September, inclusive, of 1933, by a sum which agregates more than $23,000.00. By those orders defendants revoked the license of plaintiff as a milk dealer, but offered to reinstate it if plaintiff made up the alleged underpayments to its producers.

9. Under various orders of the defendants the minimum prices fixed for payment from milk dealers to producers for Class I milk (milk so marketed as to be used for fluid consumption) was approximately four cents a quart from May 16, 1933 to July 20, 1933, and approximately five cents a quart from July 21, 1933 to the commencement of this suit.

10. Under certain orders of the defendants, as affected by the "unadvertised" provision of the aforesaid statute, the minimum prices fixed for resales from the plaintiff and [fol. 79] other "unadvertised" milk dealers to stores and restaurants in New York City, for bottled Grade B milk, were eight cents a quart from May 16, 1933 to July 20, 1933,

and nine cents a quart from July 21, 1933 to the commencement of this suit.

11. The competition offered by other milk dealers in New York City prevented and prevents the plaintiff from selling milk at prices greater than the minimum price fixed by the defendants.

12. Plaintiff's costs for handling milk at country plants and processing and transporting it to the place and condition and resale in New York City to stores and restaurants was during the period from May 16, 1933 to the commencement of this suit, slightly in excess of four cents a quart.

13. The difference between the prices fixed by the defendants as the minimum prices which plaintiff must pay for milk purchased by it from producers, and the prices at which such milk could be sold whether in the form of Grade B milk or fluid cream, has at all times been and now is insufficient in amount to afford plaintiff a fair return on the present fair value of the properties devoted by it to its milk business less depreciation.

The foregoing findings of fact are stipulated on behalf of the plaintiff and the defendants to be unobjectionable for the purpose of adjudicating the motions now presented.

Dated March 19, 1934.

Rubinton & Coleman, Solicitors for Plaintiff. Henry S. Manley, Solicitor for Defendants.

[fols. 80 & 80a] The foregoing findings of fact hereby are approved this 27th day of March, 1934.

Learned Hand, United States Circuit Judge. Wm. Bondy, United States District Judge. Robert P. Patterson, United States District Judge.

[fols. 81 & 81a] In United States District Court

[Title omitted]

Conclusions of Law

1. Chapter 158 of New York Laws of 1933, so far as involved in this suit, is constitutional and valid.

2. No reason appears for holding the orders of the defendants, so far as involved in this suit, to be otherwise than constitutional and valid.

3. The order to show cause should be discharged and the complaint dismissed.

The foregoing conclusions of law hereby are approved this 27th day of March, 1934.

Learned Hand, United States Circuit Judge. Wm. Bondy, United States District Judge. Robert P. Patterson, United States District Judge.

[fol. 82] In United States District Court

Hegeman Farms Corporation, Plaintiff,

against

Charles H. Baldwin, Thomas Parran Jr., and Kenneth F. Fee as Members of the Milk Control Board of the State of New York, Defendants

Statement of Evidence and Proceedings, and Decree—
Filed, March 28, 1934

This cause came on to be heard on due notice at the Federal Building, New York City, on February 12, 1934, before Honorable Learned Hand, United States Circuit Judge, Honorable William Bondy, United States District Judge, and Honorable Robert P. Patterson, United States District Judge, sitting as prescribed by Section 380 of Title 28 of the United States Code.

Plaintiff appeared by Rubinton & Coleman, solicitors. Defendants appeared by Honorable John J. Bennett, Jr., Attorney General of New York State and by Henry S. Manley, solicitors, Defendants filed and served their answer.

The plaintiff offered as its proof, in addition to the bill of complaint, two affidavits verified by Benjamin Greenberg, one verified on January 26, 1934, and the other on February 12, 1934. Plaintiff moved upon the pleadings and proofs for a final decree granting to it the relief prayed for in the bill of complaint.

Defendants offered as their proof, in addition to the answer, an affidavit by Kenneth F. Fee and an affidavit by [fols. 82a & b] Laurance L. Clough, each verified on Feb-

ruary 8, 1934. Defendants moved upon the pleadings and proofs for a final decree dismissing the bill of complaint upon the merits.

The issues were argued by Samuel Rubinton for the plaintiff and by Henry S. Manley for the defendants. The Court took the respective motions of the parties under advisement, reserving decision thereon. Thereupon, due deliberation having been had, an opinion was filed by the Court on March 16, 1934, and it is ordered, adjudged and decreed as follows:

That the order to show cause why a temporary injunction should not be granted be and is hereby dismissed and the temporary injunction be and is hereby denied.

That the bill of complaint be and hereby is dismissed.

Dated this 27th day of March, 1934.

Learned Hand, United States Circuit Judge. Wm. Bondy, United States District Judge. Robert P. Patterson, United States District Judge.

[fols 83 & 83a] In United States District Court

[Title omitted]

Petition for Appeal and Assignment of Errors

To the District Court of the United States for the Southern District of New York State and to the Honorable Judges Thereof:

The above named plaintiff feels itself aggrieved by the final decree of this Court entered March 1934, in the office of the Clerk thereof, and respectfully prays an appeal therefrom to the Supreme Court of the United States.

The plaintiff hereby assigns as the errors on which it will rely on such appeal that the District Court erred in making each of its conclusions of law herein.

Plaintiff prays for a reversal of said decree, and that a transcript of the record, proceedings and papers on which said decree was made and entered may be transmitted forthwith, in duly authenticated form, to the Supreme Court of the United States.

Dated March 26, 1934.

Rubinton & Coleman, Solicitors for Plaintiff.

[fol. 84] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 28, 1934

The plaintiff in the above entitled cause having prayed for the allowance of an appeal to the Supreme Court of the United States from the decree made in said suit by the District Court and entered in the office of its Clerk on March —, 1934, and the plaintiff having presented and filed its petition for appeal, prayer for reversal and assignment of errors,

Now, on motion of Rubinton & Coleman, solicitors for plaintiff, it is

Ordered, that the appeal be, and the same hereby is, allowed in the above entitled cause as provided by law; and it is further

Ordered, that the Clerk of the District Court prepare and certify a transcript of the record, proceedings and decree in this cause and transmit the same to the Supreme Court of the United States so that it shall have the same within forty days from this date; and it is further

[fols. 85 & 85a] Ordered, that security for costs on said appeal be, and the same hereby is, dispensed with, by consent of solicitors for defendants.

Dated March 27, 1934.

Wm. Bondy, United States District Judge.

[fols. 86 & 86a] Citation in usual form omitted in printing.

[fol. 87] IN UNITED STATES DISTRICT COURT

[Title omitted]

WAIVER OF SECURITY FOR COSTS

Defendants hereby consent to the granting of an order allowing plaintiff to appeal herein without the necessity of filing any security for costs.

Dated March 27, 1934.

Henry S. Manley, Solicitor for Defendants.

[fol. 88] In United States District Court

[Title omitted]

Stipulation as to Transcript of Record

Solicitors for the respective parties hereby stipulate, pursuant to subdivision 2 of Rule 10 of the Supreme Court of the United States, that the following only shall be included in the certified transcript of record required to be transmitted to the Supreme Court of the United States:

1. Order to show cause dated January 30, 1934.
2. Bill of complaint, omitting exhibits A and C, but including exhibits B, D and E.
3. Affidavit of Benjamin Greenberg dated January 26, 1934, omitting exhibits I and II.
4. Answer.
5. Motion to dismiss.
6. Affidavit of Kenneth F. Fee dated February 8, 1934, including the order appended thereto.
7. Affidavit by Laurance L. Clough dated February 8, 1934.
8. Affidavit of Benjamin Greenberg dated February 12, 1934.
9. Opinion of the District Court.

[fol. 89] 10. Findings of fact.
11. Conclusions of law.
12. Statement of evidence and proceedings, and decree.
13. Petition for appeal and assignments of error.
14. Order allowing appeal.
15. Jurisdictional statement under paragraph 1 of Rule 12 of the Supreme Court of the United States.
16. Proof of service of jurisdictional statement.
17. This stipulation.

Dated March 23, 1934.

Rubinton & Coleman, Solicitors for Plaintiff. Henry S. Manley, Solicitor for Defendants.

So Ordered.

Wm. Bondy, U. S. D. J

[fol. 90] Citation, in usual form, showing service on Henry S. Manley omitted in printing.

[fol. 91] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated April 10, 1934.

Rubinton & Coleman, Solicitors for Plaintiff. Henry S. Manley, by Robert G. Blabey, Assistant Counsel and One of the Solicitors for Defendants.

[fol. 92] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 93] In Supreme Court of the United States

Statement of Points, etc.—Filed April 25, 1934

The appellant hereby adopts its assignment of errors as its statement of points to be relied upon, and represents that the whole of the record as filed is necessary for consideration of the case.

Rubinton & Coleman, Solicitors for Appellant.

Due service upon appellees of the foregoing statement of points, etc., hereby is admitted this — day of March, 1934, and appellees hereby designate the same parts of the record for consideration.

Henry S. Manley, Solicitor for Appellees.

[fol. 94] [File endorsement omitted.]

Endorsed on cover: File No. 38,591. S. New York, D. C. U. S. Term No. 27. Hegeman Farms Corporation, appellant, vs. Charles H. Baldwin, Thomas Parran, Jr., and Kenneth F. Fee, as Members of the Milk Control Board of the State of New York. Filed April 25, 1934. File No. 27 O. T., 1934.

FILE COPY

No. [redacted] 27

HEGEMAN FARMS CORPORATION,

Appellant,

vs.

CHARLES H. BALDWIN, THOMAS FARRAN, Jr., AND KENNETH F. FEE, as Members of the Milk Control Board of the State of New York.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 988

HEGEMAN FARMS CORPORATION,

Appellant,

vs.

CHARLES H. BALDWIN, THOMAS PARRAN, JR., AND KENNETH F. FEE, AS MEMBERS OF THE MILK CONTROL BOARD OF THE STATE OF NEW YORK,

Appellees.

JURISDICTIONAL STATEMENT.

Appellant, plaintiff below, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully shows:

I.

Statutory provisions believed to sustain the jurisdiction:

Sections 238 and 266, Judicial Code, as amended by Act of February 13, 1925;

28 U. S. Code, Sections 345 and 380.

II.

Statute of the State and orders issued by appellees, defendants below, thereunder, the validity of which statute and orders is involved:

The statute the validity of which is involved is Chapter 158 of the Laws of 1933 of the State of New York, which statute added a new article known as Article 25 to the Agricultural and Markets Law of the State of New York. The said statute consists of nineteen sections numbered Section 300 to Section 319 inclusive.

The orders promulgated by appellees, and the validity of which is herein involved, are as follows:

(a) Order fixing $1.88 per 100 pounds for milk containing 3-5/10% butter fat plus an additional $.04 per hundred pounds for each additional 1/10th of 1% of butter fat content as the price which milk dealers of the class including appellant must pay for milk after May 16, 1933, which order was in force from May 16, 1933 to July 21, 1933.

(b) Order fixing $2.23 per 100 pounds for milk containing 3.5% of butter fat content, plus a $.07½ charge which was designated as a freight differential, plus $.04 for each additional 1/10 of 1% of butter fat content over and above 3.5% as the price which milk dealers of the class including appellant must pay for milk after July 21, 1933, which order has since been in effect.

(c) Order fixing $.08 per quart as the minimum price for which milk of the grade known as Grade B milk could be sold in the City of New York at wholesale after May 16, 1933, which said grade of milk is the grade that at all times herein involved has been sold by appellant, all of whose sales are made in the City of New York, and which said order remained in force between May 16, 1933 and July 21, 1933.

(d) Order fixing $.09 per quart as the minimum price for which milk of the grade known as Grade B milk could be sold in the City of New York at wholesale after July 21,

1933, which said grade of milk is the grade that at all times herein involved has been sold by appellant, all of whose sales are made in the City of New York, and which said order was in force at all times herein involved.

(e) Order fixing the prices at which fluid cream could be sold at wholesale within the City of New York after May 16, 1933, at $.27, $.39, and $.45 per quart, the variance in such prices being dependent upon the difference in the butter fat content of said fluid cream, and which order remained in force until July 21, 1933.

(f) Order fixing the prices at which fluid cream could be sold at wholesale within the City of New York after July 21, 1933, at $.31, $.44, and $.53 per quart, the variance in such prices being dependent upon the difference in the butter fat content of said fluid cream, and which order remained in full force and effect at all times herein involved.

(g) Orders dated December 29th and December 30, 1933, revoking appellant's license as a wholesale milk dealer unless appellant pay to the milk producers which sold milk to appellant during May, June, July, August, and September of 1933, an amount specified in the order of appellees dated December 30, 1933, for each 100 pounds of milk purchased by appellant during said period.

III.

Date of decree sought to be reviewed: March 27, 1934. Entered March 28, 1934.

IV.

Date of presenting application for appeal: March 26, 1934.

V.

Statement showing nature of case and rulings of District Court:

Plaintiff is a domestic corporation of New York State engaged in business as a wholesale milk dealer in that State in buying milk from producers and reselling it in New York City as cream and as Grade B milk. Plaintiff has done an average annual business of $750,000 for the past five years and the present value of the physical properties devoted to its business is approximately $450,000.

This action was brought in the United States District Court for the Southern District of New York, to enjoin appellees, acting in their capacity as the Milk Control Board of the State of New York, from enforcing against appellant certain orders made by them in such capacity. Appellant contended that the statute, under the authority of which the orders were made, was invalid as depriving appellant of its property without due process of law and denying to appellant the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Appellant further contended that irrespective of the validity of the statute the orders sought to be enforced by appellees against appellant were invalid in that they deprived appellant of its property without due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that the prices fixed by the orders of appellees at which milk must be purchased and sold were such as to prevent appellant from earning a fair return or any return on the present value of the properties devoted to the carrying on of its business.

The court below found, among other findings of fact, that "the difference between the prices fixed by the defend-

ants (appellees) as the minimum prices plaintiff (appellant) must pay for milk purchased by it from producers, and the prices at which such milk could be sold, whether in the form of Grade B milk or fluid cream, has at all times been and now is insufficient in amount to afford plaintiff a fair return on the present fair value of the properties devoted by it to its milk business less depreciation".

Appellees claim that appellant had purchased milk from producers at prices less than those fixed by appellees in their orders governing the prices to be paid to producers for milk, and ordered that appellant's license as a milk dealer be revoked unless appellant make payment to approximately 400 milk producers from whom it had purchased milk, of amounts fixed in appellees' order for each 100 pounds of milk purchased by appellant. The total payments appellant was ordered to make to such 400 milk producers was over $23,000.

The suit was heard by a court composed of Judges Learned Hand, Bondy and Patterson, convened in accordance with the provisions of Judicial Code, Section 266, United States Code, Title 28, Section 380. At the hearing appellant pressed its application for an interlocutory injunction, appellees filed and served their answer to the bill of complaint, the parties adduced their proofs, appellees moved upon the pleadings and proofs for a final decree dismissing the bill of complaint upon the merits, and the court took the respective motions under advisement, reserving decision thereon. In due course, pursuant to an opinion by Judge Hand, in which the other members of the court concurred, and upon findings made in accordance with Equity Rule 70½, appellant's contentions were overruled and a final decree was entered dismissing the bill of complaint from which final decree appellant has appealed.

VI.

Cases Sustaining Jurisdiction.

Judicial Code, Section 266, United States Code, Title 28, Section 380, provides with respect to a suit commenced to enjoin the enforcement of an alleged unconstitutional statute or an alleged unconstitutional order made by a state administrative officer or body, that a direct appeal may be taken to the Supreme Court of the United States from a final decree granting or denying a permanent injunction in such suit.

Tyson v. *Banton*, 273 U. S. 418.
McCardle v. *Indianapolis Co.*, 272 U. S. 400.
Oklahoma Gas Co. v. *Russell*, 261 U. S. 290.

Respectfully submitted,

SAMUEL RUBINTON,
LEONARD ACKER,
SAMUEL C. DUBERSTEIN,
Counsel for Appellant.

Dated March 31, 1934.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1933

No. 988

HEGEMAN FARMS CORPORATION,

Appellant,

against

CHARLES H. BALDWIN, THOMAS PARRAN, JR., AND KENNETH F. FEE, AS MEMBERS OF THE MILK CONTROL BOARD OF THE STATE OF NEW YORK,

Appellees.

CONCESSION AS TO JURISDICTION.

SUGGESTION AS TO PARTIES.

JOINT MOTION TO ADVANCE.

On this 11th day of April, 1934, the appellant has served upon the undersigned solicitor for the appellees a jurisdictional statement as required by the rules of this Court. The solicitor for the appellees acknowledges such service, concedes that the jurisdictional statement is true and correct and that the appeal is properly taken and within the jurisdiction of the Court, and states that no statement in opposition to jurisdiction will be filed on behalf of the appellees or any of them.

Chapter 158 of N. Y. Laws of 1933 (known as the 1933 Milk Control Law) at section 319 contained the following provision:

> "The board shall continue with all the powers and be subject to all the duties and responsibilities prescribed by this article until March thirty-first, nineteen hundred thirty-four, at which time the board shall be deemed abolished and the powers, duties and jurisdiction conferred or imposed upon the board by this article shall terminate."

The present suit arose under that statute, and the appellees were until March 31, 1934, the board therein mentioned. Chapter 126 of N. Y. Laws of 1934 (known as the 1934 Milk Control Law) was enacted on March 30, 1934, effective April 1, 1934, and at sections 254 and 258-j contained the following provisions:

> "The department through the commissioner is hereby vested with the powers heretofore conferred upon the Milk Control Board by Chapter one hundred fifty-eight of the laws of nineteen hundred thirty-three. * * * The transfer by this article to the division of milk control of powers, duties and functions heretofore vested in the milk control board * * * shall be deemed to constitute a continuation thereof and not a new authority, for the purpose of succession to all rights, powers, duties and obligations, and neither such transfer nor the limitation of the period originally designated for duration of the board shall affect any action or proceeding pending at the time of such transfer, and the right to commence an action or proceeding by reason of acts done or rights accrued before such transfer. * * * The rules and orders of the milk control board in effect at the time of the transfer shall remain in full force and effect until otherwise provided by the commissioner."

The provisions of the two Milk Control Laws are in material respects identical, and the orders have not been so changed but that the questions presented to the court below still are live issues between the parties. The appellee Charles H. Baldwin is the commissioner referred to in the

1934 Milk Control Law. The appellee Kenneth F. Fee is now director of the division of milk control and enforces the statute on behalf of the commissioner; he is a proper party but not indispensable in this suit. The appellee Thomas Parran, Jr., since March 31, 1934, has no part in administration or enforcement of the statute. It is agreed that an appropriate order may be made at any time and without notice discontinuing the appeal as to the appellees other than the commissioner, Charles H. Baldwin.

It is desirable from the viewpoint of both the parties to the litigation and of many other milk dealers interested, in New York State and in about a dozen States having similar statutes, that the constitutional questions presented be argued and decided as soon as they can be entertained by the court. Besides the general considerations which favor prompt decision of this litigation is the fact that upon its outcome depends payment to several hundred farmers of at least $23,000.00 for milk delivered many months ago. Although no stay order has been sought or obtained it is practically desirable that there be final decision before money is distributed among so large a group. The appeal is entitled to preferred and speedy determination under Judicial Code sec. 266 and the rules of this Court.

It is respectfully prayed that probable jurisdiction be found and the appeal advanced and set down for argument at a session of the Court to be held in May.

RUBINTON & COLEMAN,
Solicitors for Appellant.
HENRY S. MANLEY,
Solicitor for Appellees.

FILE COPY

SEP 15

CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM 1934.

No. 27.

HEGEMAN FARMS CORPORATION,

Appellant,

against

CHARLES H. BALDWIN, THOMAS PARRAN, JR., and KENNETH F. FEE, as Members of the Milk Control Board of the State of New York,

Appellees.

APPELLANT'S BRIEF

SAMUEL RUBINTON,
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Appellant's Counsel.

CASH PRESS, INC., 535 Pearl St., N. Y. Tel. Barclay 7-2670

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Supreme Court of the United States

OCTOBER TERM 1934.

No. 27.

HEGEMAN FARMS CORPORATION,

Appellant,

against

CHARLES H. BALDWIN, THOMAS PARRAN, JR., and KENNETH F. FEE, as Members of the Milk Control Board of the State of New York,

Appellees.

APPELLANT'S BRIEF.

Appeal from a decree of a Statutory Court for the Southern District of New York, composed of LEARNED HAND, Circuit Judge, BONDY and PATTERSON, District Judges, sitting as prescribed by Judicial Code, Section 266, 28 U. S. C., Section 380, which decree denied appellant's application for a temporary injunction and dismissed the complaint on the merits (R. pp. 60-61). In this brief appellant is referred to as plaintiff and appellees as defendants.

The Opinion of the District Court.

An opinion was written by Judge LEARNED HAND, in which Judges BONDY and PATTERSON concurred (R. pp. 54-57). The opinion is reported at 6 Fed. Supp. 297, advance sheets, May 14, 1934.

Jurisdiction.

The statutory provisions believed to sustain the jurisdiction of this Court are Sections 238 and 266 of the Judicial Code as amended by Act of February 13, 1925, 28 U. S. C., Sections 345 and 380.

Tyson v. *Banton,* 273 U. S. 418.
McCardle v. *Indianapolis Co.,* 272 U. S. 400.
Oklahoma Gas Co. v. *Russell,* 261 U. S. 290.

A joint statement as to this Court's jurisdiction was filed on April 25, 1934, and on May 1, 1934, the Court noted its probable jurisdiction of the case and set it down for argument for October 8, 1934.

Statement of Case.

Plaintiff is in the business of selling Grade B milk and cream at wholesale in New York City (R. p. 57). Ninety-eight to ninety-nine percent of its business consists of milk sales (R. p. 52).

Defendants constituted the Milk Control Board of New York State under Chapter 158, New York Laws of 1933 (R. p. 57). This statute, known as the Milk Control Law, was sustained by this Court in *Nebbia* v. *New York,* 291 U. S. 502. (Provisions similar to those of Chapter 158 were re-enacted by the New York Legislature in Chapter 126 of the Laws of 1934.)

Defendants were empowered by Chapter 158, Section 312 (d), to fix, by order, the minimum prices to be paid to producers for milk; and by Section 312 (b) the maximum and minimum prices that could be charged by dealers to consumers and stores, and by stores to consumers for milk handled within New York for fluid consumption. Acting under the statute, defendants made orders fixing such minimum prices. Thereafter defendants threatened

that unless plaintiff should make payments aggregating $23,000 to some 450 producers from which it had purchased its milk, from May to September, 1933, inclusive, plaintiff's license as a milk dealer would be revoked, upon the ground that it had paid less to these producers for milk than required by defendants' orders (R. pp. 7, 13, 14, 18).

This suit was then commenced to enjoin defendants from revoking plaintiff's license. Plaintiff claimed that the price-fixing sections of the statute were unconstitutional and violated plaintiff's rights under the Fourteenth Amendment to the Federal Constitution (R. p. 8). Plaintiff further claimed that the price-fixing orders made by defendants, which plaintiff was charged with violating, were unconstitutional and in violation of plaintiff's rights under the Fourteenth Amendment, since the prices fixed were such as to prevent plaintiff from earning a fair return on the present reasonable value of its properties (R. pp. 10, 11).

The court below, in accord with plaintiff's claim, in its findings of fact found:

> "13. The difference between the prices fixed by the defendants as the minimum prices which plaintiff must pay for milk purchased by it from producers, and the prices at which such milk could be sold whether in the form of Grade B milk or fluid cream, has at all times been and now is insufficient in amount to afford plaintiff a fair return on the present fair value of the properties devoted by it to its milk business less depreciation" (R. p. 59).

The court, nevertheless, held that plaintiff was entitled to no relief.

Provisions of the Statute Providing for the Fixation of Prices.

Section 312 of the Milk Control Law provides that the Milk Control Board shall make investigations as to what

prices will best protect the milk industry of New York State, and that:

> "(b) The board after making such investigation shall fix by official order the minimum wholesale and retail prices and may fix by official order the maximum wholesale and retail prices to be charged for milk handled within the state for fluid consumption, and wheresoever produced, including the following classes:
>
> 1. By milk dealers to consumers.
>
> 2. By milk dealers to stores either for consumption on the premises or resale to consumers.
>
> 3. By stores to consumers except for consumption on the premises where sold.
>
> * * * * * *
>
> (d) The board after making such investigation * * * may fix by official order the minimum prices to be paid by milk dealers to producers and others for milk of the various forms included within the definition of milk as used in this article and its various grades and uses."

The statute contains a special provision for dealers handling milk which has not a well advertised name, and as to them provides, Section 317 (c):

> "(c) It shall not be unlawful for any milk dealer who, at the time this act shall take effect, is engaged in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants, to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed by the board for such sales to stores in such a city."

Plaintiff sells no milk under a well advertised trade name (R. p. 48) and so comes within the provisions of Section 317 (c).

(Similar provisions with respect to the fixation of prices and with respect to the sales of unadvertised milk were enacted by the New York Legislature in Sections 258 (m) and 258 (q) of Chapter 126 of the Laws of 1934.)

The Orders of Defendants Fixing Prices.

Defendants fixed $1.88 per 100 pounds as the price to be paid by dealers to producers for milk containing 3.5% butter fat, plus an additional $.04 per hundred pounds for each additional 1/10th of 1% of butter fat content, when the milk being purchased was ultimately to be used for consumption as fluid milk, and $1.30 per 100 pounds for milk that was ultimately to be used as fluid cream. These prices were applicable to milk purchased in the territory known as the 200-210 mile zone, that being the distance of the territory from New York City, and that being the territory in which plaintiff made its milk purchases. These prices were in effect from May 16, 1933, until July 21, 1933 (R. pp. 8, 9, 19, 31).

From July 21, 1933, to the end of the period which is in controversy in this suit, the price to be paid for milk which was ultimately utilized as fluid milk and which was purchased in the 200-210 mile zone was fixed by defendants at $2.23 per hundred pounds plus a $.07½ charge which was designated as a freight differential, plus $.04 for each additional 1/10th of 1% of butter fat content over a content of 3.5%, and for milk which was to be used as cream, $1.55 per 100 pounds (R. pp. 9, 20, 31).

Defendants fixed $.09 per quart as the minimum selling price for grade B milk from dealers to stores and restaurants, the class of business in which plaintiff, as a wholesale dealer, is engaged. This price was in effect from May 15th to July 21st. After July 21st the price was fixed at $.10 per quart (R. p. 30).

Plaintiff comes within the class of dealers not selling well advertised milk, and by the statute and the orders of defendants was permitted to sell its milk for one cent a quart less than the sales prices so fixed in defendants' orders (Finding of Fact No. 10, R. p. 58).

Defendants fixed $.27, $.39 and $.45 per quart as the prices for which cream could be sold at wholesale from May 16th to July 21st, 1933, and after July 21st, $.31, $.44 and $.53 per quart (R. p. 10). The variance in the prices of cream depended upon differences in the butter fat content (R. p. 10).

The Threatened Revocation of Plaintiff's License.

On December 29th and December 30th, 1933, defendants ordered plaintiff's license as a milk dealer revoked unless it should pay varying amounts to the different producers from which it had purchased its milk during May to September, 1933, inclusive, so as to bring the total payments to each producer up to the minimum purchase prices fixed by defendants (R. pp. 13, 14). The total payments required to be made by defendants' orders aggregate $23,000, which plaintiff would have to pay to 450 producers (R. pp. 17, 18).

Specification of Errors.

The District Court erred in making each of its conclusions of law herein, to wit:

1. In holding Chapter 158 of the Laws of 1933 of the State of New York constitutional insofar as said statute is involved in the present action;

2. In ruling that no reason appeared for holding unconstitutional the orders of defendants involved in the within suit;

3. In denying plaintiff's application for a temporary injunction, and in dismissing the complaint.

Summary of Argument.

I. The orders of defendants fixing prices for the purchase and sale of milk, which plaintiff was charged with violating, are unconstitutional since the prices fixed were such as to prevent plaintiff from earning a fair return on the present reasonable value of its properties less depreciation.

There is no difference in economic or legal principle between a rate which fixes a maximum selling price and prevents a fair return as in the usual "rate" case and defendants' price-fixing orders.

The effect of defendants' orders is to force out of business the small dealers and to leave the field to a few large companies, and this result will frustrate the very purpose of the statute.

No fair analogy is presented between sanitary health measures and defendants' confiscatory price-fixing orders.

It does not follow from the premise that the state may regulate the prices of milk as part of its police power that it may in the course of such regulation impose rates which are confiscatory.

The spread between the price which the dealer must pay the ~~purchaser~~ producer and the "minimum" sales price fixed in defendants' orders, which competition in practice makes the maximum sales price, should be such as to afford a fair return to efficiently managed units.

II. The purpose and effect of the New York Milk Control Statute is to deprive the milk producers of other

states of the competitive advantage over New York producers possessed by them. The law therefore discriminates against the products of other states and is unconstitutional.

III. Plaintiff did not waive its right to attack the constitutionality of the statute or of defendants' orders by applying for a license under the statute.

POINT I.

The orders of defendants fixing prices for the purchase and sale of milk, which plaintiff was charged with violating, are unconstitutional, since the prices fixed were such as to prevent plaintiff from earning a fair return on the present reasonable value of its properties less depreciation.

The present fair value, less depreciation, of the plaintiff's properties devoted to its business is over $450,000 (R. pp. 5, 6; Finding of Fact No. 5, R. p. 58). This figure represents the present replacement value of the physical properties, less depreciation, and does not take into consideration either good will or "going concern value" (R. p. 16).

The New York Legislature has treated the milk industry as one affected with a public interest and has subjected to governmental regulation the prices which must be paid and may be charged for milk. When a state thus regulates the prices for which a commodity or service may be sold, it is settled by repeated decisions of this Court that the rate fixed must afford a fair return upon the value of the properties devoted to the business or else the rate will be deemed confiscatory, invalid and in contravention of the constitutional inhibition which prevents the taking of property without due process of law.

Los Angeles Gas Co. v. *R. R. Comm.*, 289 U. S. 287, 305.
United Rwys. v. *West.*, 280 U. S. 234.
McCardle v. *Ind. Water Co.*, 272 U. S. 400.
Board of Public Utility Commissioners v. *New York Telephone Co.*, 271 U. S. 23.
Ohio Utilities Co. v. *Public Utilities Comm.*, 267 U. S. 359.
Pacific Gas Co. v. *San Francisco*, 265 U. S. 403.
S. W. Tel. Co. v. *Public Service Comm.*, 262 U. S. 276, 289.
Bluefield Water Works & Improvement Co. v. *Public Service Comm.*, 262 U. S. 679.
Miss. R. R. Comm. v. *M. & O. R. R.*, 244 U. S. 388, 391.
Smyth v. *Ames*, 169 U. S. 466.

Defendants' orders established a minimum price which plaintiff must pay to producers.

The orders also established a price at which plaintiff's milk could be sold. The sales price was designated as a minimum price. In actual practice, however, the "minimum" sales price was the maximum price at which plaintiff could sell its milk. This is due to the keen competition in the wholesale milk business in New York City, because of which plaintiff would be unable to sell any of its milk if it sought to charge more than the price designated in defendants' orders (R. p. 21).

That the so-called minimum sales price in defendants' orders is also a maximum price was recognized both by the New York legislature and by defendants. The legislature by Section 317 (c) of the law, and defendants by their orders (R. p. 49), permitted vendors of unadvertised milk to sell at one cent a quart less than advertised brands. Both the legislature and defendants thereby recognized that dealers in unadvertised brands, such as plaintiff, could not get for their product even the one cent more per quart that the dealer in an advertised

brand could obtain for its milk. Both the legislature and defendants thereby affirmed that the lesser price was the greatest price that the dealer in unadvertised milk could secure for its product.

The learned District Court accordingly found as a fact:

> "11. The competition offered by other milk dealers in New York City prevented and prevents the plaintiff from selling milk at prices greater than the minimum price fixed by the defendant" (Finding of Fact No. 11, R. p. 59).

Plaintiff's Operating Costs.

Milk is delivered to wholesale dealers in 40-quart cans, which are the units used in calculating costs, operating expenses and receipts rather than the 100 pounds which is used as a unit in the statute for fixing the purchase price of milk (R. p. 22).

During the period in controversy the following figures were applicable to plaintiff's business (R. pp. 22-24):

	May 16 to July 21, 1933	*July 21 to Sept. 30, 1933*
Cost per can (as fixed by defendants' orders)	1.632	1.99325
All operating expenses	1.5738	1.5778
Total cost of milk to plaintiff	3.2058	3.57105
Amount received by plaintiff per can (allowing ½ quart per can for unavoidable spillage), being the price fixed in defendants' orders, which the District Court found competition made the highest price realizable	3.16	3.535
Loss per can	.0458	.01605

Plaintiff's Operating Costs Were Proper.

The operating costs of plaintiff are very reasonable and indicate a well managed and efficient business unit. This is shown by a report upon milk wholesalers' operating costs for August, 1933, prepared for defendants by Professor Leland Spencer of Cornell University. Professor Spencer was research director of the Joint Legislative Committee appointed to investigate the milk industry in New York State, and the report of which committee, Legislative Document (1933) No. 114, preceded the enactment of the Milk Control Law. The report of the committee is referred to by this Court in its opinion in *Nebbia* v. *New York,* supra.

The report of Professor Spencer shows the following operating costs per quart of milk for August, 1933, one of the months involved in this suit, for thirty wholesalers in New York City (R. p. 24):

Freight	.0063
Plant Costs	.0093
Selling and Delivery	.0293 .0239
General and Administrative	.0018
Total Operating Cost	.0413

The total operating cost shown by Professor Spencer's report is equal to $1.652 per 40 quart can which is $.0782 per can more than plaintiff's costs from May 16th to July 21st, and $.0742 more than plaintiff's costs after July 21st.

The propriety of plaintiff's costs and the efficiency of its operation are likewise demonstrated by the report of the Joint Legislative Committee. According to the report, page 196, the average cost of operations for sales of fluid milk for twenty-nine dealers during April, 1930, was $.0509 per quart, and for April, 1932, $.0477 a quart. This amounts to $2.036 per 40 quart can for April, 1930, and $1.908 for April, 1932. The April, 1930

and 1932 average costs of operation as shown in the Joint Legislative Committee's report were, therefore, considerably higher than plaintiff's costs of operation during the period in controversy, and there was no appreciable decrease, if any, in costs of operation between April, 1932, and May to September, 1933, the period in controversy.

In calculating its gross return, plaintiff allows a loss of one-half quart out of each 40 quart can, due to unavoidable spillage in handling (R. p. 23). This is 1¼% of the milk handled, and is very reasonable for the average loss in handling is 2.2% (Report of Joint Legislative Committee, p. 200).

There is indeed no question as to plaintiff's inability to earn a fair return in view of defendants' price fixing orders. The District Court found, upon the stipulation of the parties, that the difference between the price which plaintiff must pay for its milk and the price at which the milk could be sold was "insufficient in amount to afford plaintiff a fair return" (Finding of Fact No. 13, R. p. 59).

The decision of the District Court turned, not on the proposition that plaintiff was able to earn a fair return, but upon the theory that the Federal Constitution afforded no protection against the confiscatory orders since it was within the police power of the state to regulate the prices of milk (Opinion, R. pp. 56, 57).

There is no difference in economic or legal principle between a rate which fixes a maximum selling price and prevents a fair return as in the usual "rate" case and defendants' price-fixing orders.

The price which plaintiff must pay for its milk is fixed by defendants' orders. The orders also fix a sales price, designated as a "minimum" price, but which competition makes a maximum sales price. Theoretically plaintiff could sell its milk at any price, but actually competition fixed the designated "minimum" price as the highest sell-

ing price. The "spread" between the purchase price fixed by defendants and the selling price which economic forces fixed at the minimum selling price designated by defendants is insufficient, as the District Court found, to afford to plaintiff a fair return. This, in principle, is exactly the situation in every "rate" case in which a rate is held unconstitutional.

In the usual "rate" case a price, fixed as the maximum which may be charged for a commodity or service, is attacked as confiscatory. In such cases this Court has repeatedly held that the rate must be such as to yield a fair return over the amount necessary to pay taxes and proper operating expenses.

In the usual "rate" case the utility is unable to earn a fair return, when an order or statute fixes the selling price too low, because its costs of operation as fixed by competitive forces are such that the spread between cost and selling price is insufficient. In such case the sales end of the spread is fixed by governmental regulation and the other end by economic forces alone.

In the present case the spread is likewise insufficient because competition, together with the governmental regulation, fixes one end of the spread—the selling price—and governmental regulation alone fixes the other—the cost of the article being sold.

The only difference between the usual "rate" case and the present suit is that a different end of the spread is exclusively fixed by the governmental regulation, but there is no distinction in economic principle and there should be no difference in legal result. In each case competition fixes one end of the spread and governmental regulation the other.

Here, moreover, the sales price is fixed by competitive forces at the so-called minimum price designated by defendants' orders.

In this case as in the usual "rate" case it is the governmental regulation, in addition to ordinary business risks, which affects the return. There should be no different

legal result in the two cases merely because the regulation is imposed at different places in the train of business events, for the effect upon the business is the same.

There is no difference between the position of a utility which buys in a competitive field and which must sell at a price fixed by law, and the position of dealers such as plaintiff, which must buy at a price fixed by law and must sell at a price which competition fixes at the minimum sales price of defendants' orders. In each case one end of the spread is fixed by competitive forces, and the other end by governmental regulation, and the rule which is applied in the one case should equally be applied to the other.

This Court has uniformly held that when governmental regulation is applied to one end of the spread between cost and selling price, the application must not be such as to prevent the vendor from earning a fair return. The decision below disregards this principle, established in a long line of "rate" cases, and its affirmance would, in effect, overrule that principle.

The District Court took the view that this suit presented no more than the case of a milk dealer faced with competition, unable to sell its milk above the price fixed by that competition, and thus unable to earn a fair return. This view overlooks that the statute and defendants' orders took from plaintiff the power it previously possessed to bargain with milk producers as to the purchase price of milk. It is the governmental regulation of plaintiff's purchase price together with the competition which fixes the sales price at the minimum sales price of defendants' orders that prevent plaintiff from earning a fair return. It is the ordinary business risk for a vendor to be unable to make a fair return by reason of competition alone and to be forced out of business, but an altogether different proposition for the state to intervene and by means of price regulation to prevent the vendor from making a fair return and to destroy his business. This essential distinction was not recognized by the District

Court which refused to apply the rule of the "rate" cases, since one end of the spread between plaintiff's purchase price and sales price was fixed by competition. The District Court's decision flies square into the face of the numerous decisions of this Court in "rate" cases. Were the view of the District Court sound, then in every "rate" case the complaint would have to be rejected upon the simple ground that the spread between the cost and the sales price of the commodity or service being sold was insufficient to afford a fair return not because the sales price was fixed too low by governmental regulation, but because competitive forces fixed the costs at too high a level.

The effect of defendants' orders is to force out of business the small dealers and to leave the field to a few large companies, and this result will frustrate the very purpose of the statute.

The District Court, in line with its point of view that plaintiff was prevented from earning a profit solely because of competitive forces, ruled that plaintiff could not complain even though the effect of defendants' orders was to destroy its business and property, as well as the businesses and properties of other dealers, similarly situated, since eventually some milk dealers would weather the period of "adjustment" during which plaintiff and other dealers like it were being destroyed, and the selling price would eventually become higher so as to enable a profit to be made by the surviving companies.

The court, pointing out the destructive effect of defendants' orders, said:

> "On the other hand some selling units may have to be eliminated, the 'marginal producers'; a reduction in production will follow and almost always a rise in price. * * * The first effect may be to make all sell at a loss and there may be a marked lag before any adjustment, but plainly the loss can-

> not be permanent and general, or the trade will perish. The most that plaintiff can ask of us is to assume that in the eventual accomodation it will prove one of the weak selling units and will go to the wall" (R. p. 55).

The District Court erroneously assumed that plaintiff was a "marginal producer" being forced out of business by competition. Plaintiff is not at all like a marginal producer who is forced "to the wall." Quite to the contrary plaintiff, and others like it, that are being forced "to the wall," are small organizations, which, irrespective of the efficiency of their management, have not the financial resources to withstand a protracted period of operating at a loss. A marginal producer is one whose costs, per unit, of the commodity produced or sold by him, are so high as compared to others in the same business, that he cannot continue in business at a profit when, due to competition, there is any reduction in the sales price. Plaintiff, far from being a marginal producer, is a business unit whose costs of production are appreciably lower than the average.

In the present case it is not only the "marginal producer" which is losing money due to defendants' orders, but even those units which are so efficiently managed that their costs per unit of commodity sold are far below the average cost.

The situation is one in which all milk dealers must buy at one price—the price fixed in defendants' orders—and must sell at one price—the "minimum" sales price fixed by defendants' orders, since competition makes that minimum price likewise a maximum sales price. All milk dealers, whether they operate their businesses efficiently or not, are losing money during the "adjustment" period referred to by the District Court—the period during which some businesses will be destroyed.

The units which will be destroyed are not the "marginal producers" but those not sufficiently fortified financially to withstand operating at a loss for an extended period.

Comparatively small units such as plaintiff will be forced out of business during the "adjustment" period even though they are efficiently operated. On the other hand, the bigger and stronger organizations, being well fortified in a financial way, will survive the "adjustment" period although they be not so efficiently managed.

Three large companies already sell two-thirds of the milk distributed in New York City (Report of Joint Legislative Committee, p. 165). Defendants' orders will eliminate the numerous small dealers now operating in New York City and leave these few large companies with a monopoly of distribution.

The courts never before have permitted a state to confiscate the property of numerous small business men by imposing rates that prevent operations at a profit, upon the theory that they have no complaint since in the long run a few strong organizations will survive, which, with competition removed, will be enabled to increase prices to the ultimate consumer. Yet that is the principle upon which the District Court justified defendants' orders. The court said:

> "Surely it is a mild assumption that the more vital interest in the end may demand that there should be less goods sold at higher prices, rather than that all existing manufacturers should remain in business" (R. p. 56).

A state may not properly impose confiscatory rates merely because they will not destroy the entire industry, but will eventually lead to a monopolistic control of the market and a higher price to the ultimate consumer.

Indeed, in *Borden's Farm Products Co.* v. *Baldwin*, not yet reported, a Statutory Court, likewise sitting for the Southern District of New York, composed of LEARNED HAND, Circuit Judge, GODDARD and COXE, District Judges, in passing upon certain provisions of Chapter 126 of the New York Laws of 1934, which statute is substantially the

ame as the statute now before the court, ruled that the ublic policy of New York is to prevent and not foster nonopoly. In that case the Borden Company attacked, as n arbitrary and unconstitutional classification, the provi-ion of the Milk Control Law which permitted unadvertised nilk to be sold at one cent a quart less than advertised rands. The District Court recognized that the basis of he classification was that unadvertised milk would be orced out of the market by the well-known brands if t had to be offered for sale at the same price, and that he purpose of the classification was to afford vendors f unadvertised brands an opportunity to remain in usiness. The District Court further held that such pur-ose sustained the classification in view of the settled ublic policy against monopoly.

In the *Borden* case, Circuit Judge LEARNED HAND, writ-ng for the unanimous Court, said:

> "The situation here was such that the legislature might fear that the larger dealers would gather into their hands substantially all sales of milk to stores; just as they already had gathered direct sales to consumers. If the 'independents' had to sell at the same minimum, the public would probably choose the well-known brands; at any rate that was a reasonable possibility, to be provided against if the result was undesirable. Perhaps it was not; it may be better to allow the four larger companies to take full advantage of their advertising, of their reputation for cleanliness and quality; certainly it is true that the statute seeks to take from them economic advantages which were not only theretofore lawful, but which have generally been commended and fostered. But the consequences of allowing these advantages their full effect would probably, or at least it might, eliminate the 'independents' from that part of the market which fed stores. If it did, the whole market would fall into few hands. That might be a good thing, or it might be a bad; but concentration of economic

> power has generally been watched with a jealous eye in this country. To prevent it or to break it up, rather than to regulate it after it arises, has on the whole been our preferred way; and in this instance competition between the four 'well-advertised' dealers, might be thought not enough security."

In the present case the District Court followed an entirely different line of reasoning when they held that the state could validly destroy the property and businesses of numerous small dealers because in the end some strong organizations would survive. In this suit the District Court sustained defendants' orders, although they recognized that a monopoly would probably be effected by them, whereas, in the *Borden* case the same Court recognized that the New York Legislature did not intend a monopoly of distribution to be brought about by the statute, and had therefore inserted special provisions to forestall any monopoly.

Defendants' orders thus tend to bring about a monopoly, an evil which the legislature sought to prevent by specific provisions in the statute, and they furthermore are in contravention of the basic purpose of the statute since they tend to destroy the small dealers and to leave the business of distributing milk in the hands of a few large organizations.

The primary purpose of the statute, under which defendants issued their orders, is the protection of the dairy farmers of New York (Report of Joint Legislative Committee, pp. 13, 14). The statute itself provides (Section 312 [c]):

> "* * * that the benefits of any increase of prices received by milk dealers by virtue of the minimum price provisions of this section shall be given to producers."

The factor in the production of milk in New York State which resulted in dairy farmers being affected

by the current economic depression to a greater degree than other businesses is the production at all times of a surplus of milk over the consumers' requirements for fluid milk, which surplus cannot be sold by the producer at a profit. This surplus must be at all times maintained because milk is a necessary food, the demand for which varies from day to day and from season to season.

Nebbia v. *New York*, supra.
Report of Joint Legislative Committee, pp. 15, 16, 38, 40, 77, 78.

The effect of defendants' orders, as recognized by the District Court, is to force out of business those dealers unable to operate for any extended period at a loss. The resultant monopoly of distribution in the hands of a few large companies will tend to destroy large numbers of milk producers for two reasons.

In the first place, the inevitable effect of a monopoly of distribution will be an increase of the price of milk to the consumer. Such increase in price will bring about a decrease in consumption, for it is axiomatic that an increased price results in decreased consumption, as the District Court recognized (R. p. 56). The principal difficulty which the milk producer now faces is the presence of a large surplus over fluid needs and such decrease in the consumption of milk will serve to aggravate the very evil which the statute is intended to alleviate.

In the second place each milk dealer represents an outlet for the production of numerous dairy farmers. The necessary consequence of eliminating a number of milk distributors will be the destruction of the outlets relied upon by great numbers of dairy farmers for the sale of their product. With the outlet for their milk gone the investments of great numbers of dairy farmers will be jeopardized or destroyed. Dairy farmers whose customary outlets are destroyed by the operation of defendants' orders will be unable to find new profitable outlets

for their production since the dairy farmers of New York already produce more milk than can be profitably sold. The distribution of milk as a result of defendants' orders will become centered in the hands of a few large companies which are already fully supplied by their own producers (Report of Joint Legislative Committee, pp. 108, 132). Even if new outlets for their production could be found, the dairy farmers would in all probability be unable to survive any extended period during which they would be compelled to seek such new outlets and during which they could not dispose of their production. Such loss of outlet leading to a curtailment of the dairy industry would likewise lead to the abandonment of large areas of land in New York State (Report of Joint Legislative Committee, p. 31).

In *Borden's Farm Products Co.* v. *Baldwin*, the District Court recognized that the effect of eliminating ~~producers~~ dealers would likewise be to curtail the market in which the dairy farmers could sell their product. In sustaining the provision which permitted unadvertised milk to be sold at a lesser price than well known brands, the court said:

> "Further, it seems to us that the section may have been thought to fit in with the major purpose of the statute, which was to relieve the dairy farmer by insuring him a better price without reducing his market. His price was fixed for all 'Independents' and 'well-advertised' dealers alike; but the amount of milk sold might vary with the price to the consumer, at least that is true for most commodities. The attempt was not to fix two prices in the same market for the same commodity; the hypothesis is that to the public a well-known brand is of different quality. If this proves true, the several brands will sell together, the cheaper will not drive out the dearer. The result will be, or it may be—for we must deal only in possibilities—that more milk will be marketed than if the fixed price were uniformly maintained, though less than if it were lowered."

Defendants' orders, therefore, tend to bring about a result exactly contrary to the paramount purpose of the statute, for they tend to destroy great numbers of milk producers, whereas, the statute was enacted primarily for the preservation of the milk-producing industry of New York State.

The rule is firmly established by the decisions of this Court that a statute is valid only if "the means selected shall have a real and substantial relation to the object sought to be attained".

Nebbia v. *New York*, supra.
Adair v. *United States*, 208 U. S. 161.

This rule should apply equally to administrative orders issued under a statute, such as defendants' orders, and one of the tests of the constitutionality of defendants' orders properly is whether they have a "real and substantial relation to the object sought to be attained". Instead of any such relationship to the object sought to be attained the orders of defendants have exactly the opposite effect for they tend to defeat the purpose of the very statute which empowered their issuance.

No fair analogy is presented between sanitary health measures and defendants' confiscatory price-fixing orders.

The District Court took the view that plaintiff had no more standing to complain of defendants' confiscatory orders than it would have to complain of a law which provided for "improvements in working conditions, or in the hygienic quality of the product" which would increase expenses of operation (R. p. 56).

It is true that a sanitary ordinance which, for example, required the washing of bottles or the pasturization of milk would be a regulation of the use of plaintiff's property and that defendants' orders are likewise a regulation of the use of plaintiff's property, but it does not follow

that because the one type of regulation would be valid that every type is valid. The difference in degree between the inhibitions upon the use of plaintiff's property created by a sanitary ordinance and the inhibitions created by defendants' orders is so great that the two types of regulation must be regarded as falling into entirely different categories.

In testing the validity of a measure which regulates the use of private property, it is the degree of regulation which is the important consideration and not the solitary factor that the law is a regulatory one. *Penna. Coal Co.* v. *Mahon,* 260 U. S. 393, 415. Thus statutes which regulate the height and type of buildings which may be erected, such as zoning laws, are sustained as valid exercises of governmental authority, but it would be an altogether different proposition for a state or municipality to prohibit owners from putting their land to any use whatever, without compensation to the owners. *Penna. Coal Co.* v. *Mahon,* supra. Yet, such statute, like the ordinary zoning law, is one that regulates the use of real property and which is distinguishable from the usual law only by the degree of regulation. Even the usual zoning law has been treated as invalid in its application to a particular owner when its operation is such as to deprive such owner of all beneficial use of his property.

Eaton v. *Swecney,* 257 N. Y. 176.
Dowsey v. *Village of Kensington,* 257 N. Y. 221.

So in the present situation, it is one thing to enact sanitary requirements which are necessary for health purposes and an altogether different thing to issue orders under a law whose purpose is to protect milk producers, which orders prevent milk dealers from earning a fair return and which will have the effect of forcing numerous small dealers out of existence. A sanitary law does not disturb the power of entrepreneurs to bargain with respect to both the purchase price and the sales price

of the commodity in which they deal, and their bargains may be made so as to adjust their businesses to the additional costs imposed by the sanitary regulation. In the present case, quite to the contrary, the confiscatory effect of defendants' orders cannot be met by adjustments in bargaining, for one end of the dealers' spread, viz: the buying end, is fixed by law, and in actual practice the other end of the spread is fixed by competition at the "minimum" sales price designated in defendants' orders.

A regulation which fixes the price of the very commodity which the dealer is handling destroys his bargaining power and leaves him powerless to earn a profit when, as here, the rates fixed are confiscatory, whereas, the sanitary regulation in no manner affects the bargaining power in relation to the commodity being handled. There is no valid basis for the assumption of the District Court that defendants' orders are valid because sanitary ordinances which have increased operating costs have been upheld.

It does not follow from the premise that the state may regulate the prices of milk as part of its police power that it may in the course of such regulation impose rates which are confiscatory.

The District Court held that since the state was privileged to regulate milk prices as part of its police power plaintiff could not complain of defendants' orders even though the orders prevented plaintiff from earning any profit and would destroy plaintiff's business.

The court said (R. p. 56):

> "The 'Police Power' was sometimes spoken of as though it concerned only 'health and safety'. That mode has disappeared; the purpose of the State of New York to preserve its dairy industry may involve remote repercussions as mortal to some individuals, as its purpose to abolish sweatshops; but

> once it be agreed that the state may interpose for either end in the 'free play of supply and demand,' the incidents follow. It is not critical that some will find themselves unable to withstand the pressure and will collapse.
>
> * * * * * *
>
> Just as it (the plaintiff) is exposed to the rubs of competition in what it buys on an uncontrolled market, and must make such fetch to adjust as it can, so it must accommodate its dealings to a price fixed, as we now know, in the plenitude of municipal power. That power once granted, its transmitted disturbances the Fourteenth Amendment does not neutralize" (R. p. 57).

In *Nebbia* v. *New York,* this Court sustained the regulation of milk prices as within the police power of the state, but the power to regulate rates does not imply the power to impose confiscatory rates.

This Court has established the rule that the police power as well as the other governmental powers of the states are subject to the limitations of the Federal Constitution.

In *Southern Railway Co.* v. *Virginia,* 290 U. S. 190, the Court, holding invalid a Virginia statute which effected a taking of property without due process, said:

> "The claim that the questioned statute was enacted under the police power of the State and therefore is not subject to the standards applicable to legislation under other powers, conflicts with the firmly established rule that every state power is limited by the inhibitions of the XIV Amendment" (Citing cases) (p. 196).

See also to the same effect:

> *Adkins* v. *Children's Hospital,* 261 U. S. 525, 549.
> *Atchison & Santa Fe Ry.* v. *Vosburg,* 238 U. S. 56.

Grenada Lumber Co. v. *Miss.*, 217 U. S. 433, 441, 442.
Walling v. *Michigan*, 116 U. S. 446, 460.
New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S. 650, 661, 662.

In every case in which a state is allowed to fix the rates which may be charged for a commodity or a service, the underlying theory is that such fixation of rates is a part of the police power of the state.

Union Dry Goods Co. v. *Georgia P. S. Comm.*, 248 U. S. 372, 375.
German Alliance Insurance Co. v. *Kansas*, 233 U. S. 389.

In the *Union Dry Goods Co.* case, this Court said:

> "* * * capital invested in an electric light and power plant to supply electricity to the inhabitants of a city is devoted to a use in which the public has an interest which justifies rate regulation by a state in the exercise of its police power" (pp. 374, 375).

Nevertheless, this Court, while sustaining the power of the states to fix rates in connection with various businesses, has uniformly adhered to the rule that the rates must afford a fair return.

Defendants' orders do not, in fact, tend to promote the public welfare, and their effect is to contravene the purpose of the Milk Control Law. But even though they were beneficial to the public instead of detrimental, such fact would not validate them, in view of their confiscatory nature. As stated by Mr. Justice Holmes in *Penna. Coal Co.* v. *Mahon*, supra:

> "* * * a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change" (p. 416).

And in *Paducah* v. *Paducah Ry.*, 261 U. S. 267, 272, this Court pointed out that there is a constitutional right to a fair return on property when the use of such property is subjected to rate regulation, and that unless contracted away such right:

> "may not be overridden by legislative enactment or considerations of public policy" (R. p. 272).

The economic philosophy and theory underlying the federal legislation enacted during the present national administration, commonly known as "The New Deal", does not in the slightest justify the taking of the property of one group of citizens for the benefit of another group, and so would not in any wise justify the confiscation of the property of plaintiff and of other small dealers for the benefit of the dairy farmers, assuming, contrary to the fact, that defendants' orders had any such beneficial effect.

In the Green Bay, Wisconsin, address of President Roosevelt of August 9, 1934, he stated in part:

> "This Government intends no injury to honest business. The processes we follow in seeking social justice do not in adding to general prosperity take from one to give to another. In this modern world, the spreading out of opportunity ought not to consist of robbing Peter to pay Paul."

The President's statement reiterates the constitutional principle established by this Court, that a state may not take the private property of one person for the benefit of another.

> *Missouri Pacific Ry.* v. *Nebraska*, 164 U. S. 403, 417.

There is nothing in *Nebbia* v. *New York*, supra, which in the slightest shows that this Court intended a different principle to apply to the rates that could validly be imposed in connection with the milk business than has

been applied by this Court in the usual "rate" case. Indeed, the opinion of the Court indicates just the contrary. In sustaining the power of the state to regulate milk prices for the promotion of the public welfare, the opinion of Mr. Justice ROBERTS stated that due process demands:

> "* * * that the law shall not be unreasonable, arbitrary or capricious" (p. 525).

If the law which the state may pass must be reasonable and not arbitrary in order to conform to due process, then by a parity of reasoning the orders which administrative officials may make under the law must conform to the same standard. Certainly an order which in its operation is confiscatory, which forces out of business efficiently operated organizations, which tends to bring about monopoly, increased prices and decreased consumption, and which defeats the purpose of the statute under which it is issued, is "unreasonable" and "arbitrary."

If defendants may validly make orders which prevent plaintiff from earning a fair return, although it is an efficiently managed unit which operates at less than the average cost, then by the same token a public service commission, under a law permitting the regulation of rates for electricity, may fix a rate of one cent a kilowatt hour, even though it cost a company, operating at maximum efficiency, five cents a kilowatt hour to supply the electricity. Such result would be startling to say the least but it is the necessary sequence of the District Court's holding that plaintiff has no complaint with respect to defendants' orders, since the state may regulate milk prices as part of its police power.

It is highly significant that the report of the Joint Legislative Committee in discussing the power of the state to fix prices for milk (pp. 271-295) recognizes that any regulatory statute would fall into the same category as statutes fixing rates for utilities, and that the prices fixed would have to be such as to afford a fair return. The

legislative committee's report reads in this respect (p. 289):

> "Necessary Provision in Price Fixing for a Fair Return on the Investment in the Public Utility
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> Price fixing cannot preclude a fair return, and reduction below this is confiscation, Municipal Gas Co. v. Public Service Commission, 225 N. Y. 89, page 95, citing:
>
> Smith v. Ames, 169 U. S. 466.
> Minnesota Rate Cases, 230 U. S. 352, 434.
> Missouri v. Chicago, Burlington & Quincy R.R. Co., 241 U. S. 533.
> Rowland v. St. Louis & S. F. R. R. Co., 244 U. S. 106.
> City & County of Denver v. Denver Union Water Co., 246 U. S. 178.
> Willcox v. Consolidated Gas Co. of N. Y., 212 U. S. 19.
>
> A fundamental theory of public utility regulation is that there shall be but one rate for the same service. Such a rate must be one which will enable the public utility to realize the expense of operating, meeting its financial obligations for investments with reasonable excess for dividends, etc. The price fixing regulation could be confined to distributors' spread or it might be extended to fixing the price for purchase and sale of milk. The Court would have the ultimate right to determine judicially the fairness of the return. A return which is not fair based on the proper factors entering into the question, might be regarded as confiscatory and unconstitutional in taking one's property without due process of law."

The legislative committee thus realized the limitations which this Court has affixed to the exercise of the rate making power of the states, but the District Court ignored these limitations.

The spread between the price which the dealer must pay the purchaser and the "minimum" sales price fixed in defendants' orders which competition in practice makes the maximum sales price, should be such as to afford a fair return to efficiently managed units.

In the usual "rate" case the business to which the rate is applied is in the nature of a monopoly so that each business unit can be treated separately in determining whether a rate is fair.

In the field to which the New York Milk Control Statute applies the same method of treatment is impossible as a practical matter, for the field is highly competitive and there are great numbers of dealers.

Defendants' orders fix a minimum buying price which is the lowest price at which milk may be purchased from producers, and a so-called minimum selling price, which competition in actual practice makes likewise the maximum sales price, since some dealers will always attempt to sell at that price in an endeavor to capture trade. With some dealers selling at the minimum price fixed in defendants' orders, plaintiff and others in its position would be unable to sell their product should they offer it for a higher price.

The orders regulating prices should properly allow such spread between the buying and selling prices as will allow an efficiently operated business unit to earn a fair return upon the reasonable value of its properties. When the state regulates prices in a competitive field in which there are a great number of entrepreneurs, then, efficiently managed units, whose operating costs are, therefore, proper operating costs, should be permitted to complain of rates that prevent a fair return from being earned despite the efficiency of management.

Unless such rule be adapted, the effect of rate regulation in competitive fields will be the elimination of small units and the fostering of monopoly, a result contrary to

all previous concepts of public policy and welfare and violative of established American tradition.

Plaintiff's costs of operation are less than the average so that it is an efficiently managed business unit which rightfully should be permitted to complain of defendants' orders since defendants' orders prevented plaintiff from earning any profit despite the efficiency of its management.

POINT II.

The purpose and effect of the New York Milk Control Statute is to deprive the milk producers of other states of the competitive advantage over New York producers possessed by them. The law therefore discriminates against the products of other states and is unconstitutional.

In *Nebbia* v. *New York,* this Court sustained the New York Milk Control Statute as a valid exercise of the state's police power. There are some constitutional problems with respect to the law that apparently were not presented to or considered by the Court in that case, so far as appears from the majority and minority opinions, and we respectfully submit them for the consideration of the Court.

The chief difficulty which confronts the New York milk producer is the production of a surplus over the fluid milk requirements of the consumers of the state.

> *Nebbia* v. *New York,* supra.
> *Report of the Joint Legislative Committee,* pp. 16, 38, 39, 40, 77, 78.

Of the milk which is produced and sold by New York dairy farmers 51 percent is eventually sold as fluid milk, 22 percent as cream and 27 percent as cheese, condensed and evaporated milk, butter, ice cream and

other manufactured products (Report of the Joint Legislative Committee, p. 83).

In 1932 the New York market received 69 percent of its milk supply and 77 percent of its cream supply from New York producers, leaving 31 percent of its milk and 23 percent of its cream supply that was supplied by other states (Report of the Joint Legislative Committee, pp. 34, 36). Milk and cream is received in New York from six other states and also from Canada (Report of the Joint Legislative Committee, p. 19).

The New York milk farmers themselves sell a part of their production to other states (Report of the Joint Legislative Committee, p. 19).

In 1930 the amount of fluid milk and cream that was consumed in New York exceeded by 17 percent the amount supplied by the New York producers, and the deficit was supplied by the other states which, together with New York, make up the New York milk shed (Report of the Joint Legislative Committee, p. 37).

The peculiar problem which confronts the New York milk farmer is the disposition of the 27 percent of his production which is utilized for non-fluid consumption since this portion of his production must meet the competition of manufactured dairy foods produced in states where costs of production are lower than New York.

Thus the report of the Joint Legislative Committee in its conclusions and recommendations reads (p. 16):

> "(d) Surplus milk is a serious problem because the prices which can be realized for it are much less than the prices realized for milk sold for consumption in fluid form or as cream. This is due to the fact that surplus milk products must be disposed of in competition with those produced in other regions where costs are lower. The prices realized for surplus milk usually are less than the prevailing costs of production in this state and the loss on this part of the milk must be made up (if at all) in a correspondingly higher price for fluid milk and cream."

The report of the legislative committee further reads at page 38, quoting from an article by Dr. H. A. Ross of Cornell University:

> "The price obtained for this surplus milk, however, is usually less than that paid for fluid milk in city markets. This is particularly true in New York, where butter, cheese, and condensed milk produced under conditions of high cost, must compete in the open market with the same products from the cheaper producing regions of the mid-West. It costs less to ship a pound of butter from Iowa to New York than to ship sufficient corn to produce that amount of butter here. Nevertheless, the availability of extensive pasture areas in the State of New York has resulted in the development of a dairy industry which, during the greater part of the year, supplies far more milk than is consumed in fluid form by the great urban population of the near-by cities. These cities have been demanding more and more milk each year, but even in 1925 only 52.1 percent of the milk handled in New York milk plants was used as fluid milk. During the same year, however, there was a period when the New York City supply was barely adequate to meet the demand for fluid milk. That is, supply and demand are not in adjustment, and seasons of shortage alternate with seasons of surplus."

And at page 108, the report, quoting from the testimony of Mr. F. H. Sexauer, president of the Dairymen's League Co-operative Association, Inc., of New York, reads:

> "'for some time it (The Dairymen's League) tried the experiment of manufacturing a large quantity of milk into condensed and evaporated milk, but the competition was so strong, especially with the condensers of the West where milk could be bought cheaply because of lower production costs, that the net return upon such manufactured milk was not commensurate with the high production costs in this territory and with the relative net return of fluid milk in the milk shed.'"

That the problem of the New York milk producer is essentially the disposal of his surplus product in competition with the manufactured dairy products of other states, where production costs are lower, is judicially affirmed by the decision of the New York Appellate Division, Fourth Department, in *Barns* v. *Dairymen's League Co-operative Association, Inc.*, 220 App. Div. 624, decided in 1927. In that case the court stated:

> "* * * it is necessary that the general situation of the milk industry be considered. The whole difficulty seems to arise from the fact that milk is a perishable product and that owing to irregularities of production and consumption there is periodically a surplus which must be manufactured into a permanent product which brings a lower price for that purpose than when marketed as fluid milk for immediate consumption" (p. 627).
>
> * * * * * * *
>
> "* * * the normal production of the dairies has a large seasonal variation, the output being twice as great in the months of April, May and June as it is in the corresponding months in the fall. There is likewise a daily surplus which is naturally left over in the hands of the dealers who must carry a supply sufficient to meet their daily maximum needs for fluid milk. A third surplus is found in an actual excess of production in the New York milk zone over fluid milk demands even in the short months of the year. All of this surplus must be manufactured into permanent products such as butter, cheese, evaporated milk, etc., but when it is so manufactured it comes into competition with country-wide and world-wide markets and commands a much lower price. Milk products manufactured from milk produced in the middle west, for example, carry a lower production cost because the milk is produced on cheaper land, with cheaper feed and under less restricted conditions than are required by the New York fluid milk market. The problem of the farmer therefore, who is in the New York milk zone, is the problem of disposing of his surplus to the best advantage" (pp. 627-628).

The especial protection which the New York milk farmer needed, therefore, was a protection against the competition of the milk producers of other states, and the Milk Control Statute of 1933 is essentially a scheme to ensure the New York farmer a price sufficiently high for his milk to enable him to operate at a net profit even though he have surplus milk which cannot be profitably sold.

The 1934 Law (Laws of New York, Chapter 126) entails the same protective scheme and the Milk Control Division, established by that law, is empowered to fix "the minimum prices to be paid by milk dealers to producers and others for milk in its various grades and uses" (Section 258-m [1a]).

It is clear that the protective scheme embodied in the statute could not successfully operate in the New York market which, in addition to manufactured milk products, receives 31 percent of its fluid milk supply and 23 percent of its cream supply from other states in which milk is more cheaply produced if the milk producers of those other states could sell and ship their product to the New York market without restriction.

The keystone of the protective scheme is found, therefore, in Section 312 (g) of the 1933 statute, which compels producers of other states to sell their product at the price fixed by the New York Milk Control Board if the milk is ultimately to be utilized in New York. That section reads:

> "(g) It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article on the board shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk pur-

chased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful."

(The same provision is in Section 258-m [4] of the 1934 Statute.)

The statute under which defendants' orders were issued is essentially a protective device to guard the milk farmers of New York against the competitive advantage possessed by the milk farmers of other states in which milk can be produced more cheaply than in New York. It compels the farmers of other states to sell at the same price as the New York farmer sells his milk and thus equalizes the price of local milk and milk produced outside the state in exactly the same manner as would a protective tariff. Milk can be produced in Pennsylvania so as to be sold profitably, say, for $1.00 a hundred pounds, whereas $1.50 a hundred pounds is necessary to give a profit to the New York producer. Were New York to impose a tariff of 50 cents on each 100 pounds of Pennsylvania milk in order to equalize the prices of the New York and Pennsylvania product, the money received would go to the New York State Treasury. In that respect the present law differs from a tariff law, but there is no difference between the present law and such tariff law insofar as each operates equally as a discrimination against the products of other states, for each law takes from the producers of the other states the competitive advantage possessed by them over the New York farmer. The statute, therefore, is nothing more or less than a device to protect the New York farmer against the competition of the producers of other states, and is invalid for it contravenes the rule that no state may validly enact a law which discriminates against the products of other states.

Texas Co. v. *Brown,* 258 U. S. 466.
Darnell & Son v. *Memphis,* 208 U. S. 113, 120, 125.

Brimmer v. *Rebman*, 138 U. S. 78.
Guy v. *Baltimore*, 100 U. S. 434.
Welton v. *Missouri*, 91 U. S. 275.

The orders which plaintiff is accused of violating are without legal standing therefore since they find their basis in a statute which itself lacks validity.

The specific protective device adopted by the legislature, to-wit, forbidding the sale of milk in New York which has been purchased in other states unless there paid for at the price fixed by the New York Milk Board, in itself violates the constitutional inhibition against the states imposing direct burdens on interstate commerce.

The purchase of milk in other states, and its movement into New York for sale, is clearly interstate commerce.

East Ohio Gas Co. v. *Tax Comm.*, 283 U. S. 465, 471, 472.
United States v. *Erie R. R.*, 280 U. S. 98, 101.
Foster Packing Co. v. *Haydel*, 278 U. S. 1, 10.
Shafer v. *Farmer's Grain Co.*, 268 U. S. 189.
Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282, 290.

The rule is stated in *Furst* v. *Brewster*, 282 U. S. 493, 497, 498:

> "* * * every negotiation, contract, trade, and dealing between citizens of different states which contemplates and causes such importation (from one state into another) whether it be of goods, persons or information, is a transaction of interstate commerce. Such commerce comprehends all the component parts of commercial intercourse between different States * * *."

It is fundamental that the states may not validly impose any direct burden upon interstate commerce.

Furst v. *Brewster*, 282 U. S. 493.
Foster Packing Co. v. *Haydel*, 278 U. S. 1.

Di Santo v. *Pennsylvania,* 273 U. S. 34.
Minnesota Rate Cases, 230 U. S. 352, 396.

No greater burden upon interstate commerce can be imposed than is imposed by the statute in suit. The statute is not a health regulation, prescribing the quality of milk which may be sold in New York, but is an out and out attempt to fix the price at which milk may be purchased in other states, by making it unlawful to sell milk which has reached New York by way of interstate commerce, if the seller and purchaser of the milk have not complied with the terms of the New York statute. Obviously, such an enactment destroys interstate traffic unless those engaged therein are willing to comply with the local law, for no purchases will be made of milk which cannot ultimately be resold.

Accordingly in *G. A. F. Seelig, Inc.* v. *Baldwin,* decided August 2, 1934, not yet reported, a Statutory Court, sitting for the Southern District of New York, ruled that the portion of the statute, attempting to regulate the price of milk produced outside of New York, was unconstitutional, as applied to milk which was being sold in New York in the "original package" in which it was received.

If the New York Milk Control Law be valid, then we are confronted with the evil of any state of the Union passing a similar statute to protect some "home industry" against the competition of the same industry carried on in another state where production costs are lower.

Such attempt by the states to favor their own industries as against the industries of other states is not idle conjecture for such interstate commercial rivalry was an ugly fact which preceded the adoption of the Constitution and the abolition of which was one of the great purposes of its framers.

In *Beard, The Rise of American Civilization,* Vol. 1, the interstate commercial rivalry existing under the Arti-

cles of Confederation and prior to the adoption of the Constitution is described as follows (p. 305):

> "* * * Worse than the monetary system were the impediments in the way of interstate commerce. Under local influences legislatures put tariffs on goods coming in from neighboring states just as on foreign imports, waged commercial wars of retaliation on one another, raised and lowered rates as factional disputes oscillated, reaching such a point in New York that duties were levied on firewood from Connecticut and cabbages from New Jersey.
>
> If a merchant surmounted the obstacles placed in his way by anarchy in the currency and confusion in tariff schedules and succeeded in building up an interstate business, he never could be sure of collections, for he was always at the mercy of local courts and juries—agencies that were seldom tender in dealing with the claims and rights of distant creditors as against the clamors of their immediate neighbors. While the Articles of Confederation lasted there was no hope of breaching such invincible barriers to the smooth and easy transaction of interstate business."

Professor Beard in the same work points out that one of the principal purposes of the framers of the Constitution was to cure the evils which resulted from the interstate commercial rivalry. The learned author states (Vol. 1, p. 324):

> "Having clearly in mind foreign discriminations and the commercial anarchy that existed among the states, the framers of the Constitution provided that Congress should have power to regulate foreign and interstate commerce, thus wiping out state tariff lines and creating a national market area behind a federal wall."

Under the Articles of Confederation the commercial rivalry between the states found expression in tariffs against the products of other states, but the same dis-

crimination which was intended to be abolished by the Constitution is equally created by a tariff and by a law such as the New York Milk Control Law, which by a different method destroys the competitive advantage enjoyed over New York milk producers by the citizens of other states.

It is of the utmost significance that even before the decision of the District Court, declaring invalid that part of the law which seeks to fix the price of milk produced outside of New York, the administrative officials entrusted with the enforcement of the law recognized the invalidity of the legislature's attempt to regulate the price of milk produced in other states and their inability to control such prices.

Thus, an article in the New York Times of January 3, 1934, read in part as follows:

> "ALBANY, Jan. 2 (AP).—With collapse of its price-control system probable unless immediate action toward adjustment is taken, the New York Milk Board moved swiftly today to obtain the cooperation of other States in regulation of the milk industry.
>
> * * * * * *
>
> The recent weakening in the board's price control has been attributed to shipments of cheap milk from other States. Efforts to place these States under a milkshed code were begun in August but have not thus far succeeded.
>
> Chairman Charles H. Baldwin of the State board said there might be difficulty in persuading States now profiting by the New York regulations to give up their profits and cooperate with New York."

Another article which appeared in the New York Times of January 8, 1934, read in part as follows:

> "Special to The New York Times.
>
> ALBANY, Jan. 7.—The New York and New Jersey Milk Control Boards have prepared a joint plan

for stabilizing the New York milk shed, which will be presented at a public hearing here tomorrow.

* * * * * *

Federal Aid Sought

'Effective control of certain aspects of the milk industry in the New York-New Jersey metropolitan milk shed necessitates the regulation of interstate commerce, which can be accomplished only by the Federal Government,' the board said."

An article which appeared in the New York Evening Post of February 9, 1934, and which was an account of a meeting of milk producers held at Syracuse, New York, reads in part:

"'They listened intently to Charles H. Baldwin, State Commissioner of Agriculture and chairman of the State Milk Control Board, and Fred H. Sexauer, president of the Dairymen's League, who told them that the whole price structure of the milk business is on the point of collapse.

Only an effective Federal agreement, and that forthcoming promptly, can avert chaos, they were told.'"

The articles to which reference has just been made were presented to the court below (R. pp. 17, 51).

Another article which appeared in the Knickerbocker Press of Albany, New York, on January 10, 1934, read in part as follows:

"His representatives are in Washington to enlist the help of President Roosevelt in speeding federal aid in controlling the milk market, Governor Lehman yesterday told 1,200 grim-faced dairymen as threats of a new statewide milk strike were being voiced at a hearing on a proposed bi-state compact to prevent collapse of the present price structure.

* * * * * *

'We might just as well face an unpleasant situation courageously and look the facts in the face,' said Mr. Lehman. 'I feel it my duty to say to you,

> gentlemen, that I am deeply apprehensive with regard to the milk situation in this state unless we can secure federal cooperation in the working out and the administration of the problems of the several states that go to make up the New York milk shed * * *.'"

The effect of defendants' inability to control the prices of milk produced outside of the state, is to put the New York milk industry, which the statute was intended to safeguard, in a worse position than it was before the enactment of the statute. Defendants, as they have recognized, and as the District Court has held, are unable to control the price of milk produced outside of the state. The inevitable result is that dealers will make as many purchases as possible outside of the state, since they can make such purchases at any price reached by bargaining, and not at the minimum price fixed by defendants. This will increase the amount of milk purchased outside the state and decrease the purchases in New York, so that the New York milk producers, instead of being safeguarded by the law, will be injured. The evil which the legislature intended to remedy by the statute—the surplus of New York production over demand—is aggravated by the law, which in its operation causes dealers to increase their purchases in other states.

It is apparent from the statute and from what has transpired since its enactment that its price-fixing provisions are utterly ineffective to safeguard the milk industry of New York. The pressure of the supply of milk from other states, the price of which cannot be controlled, makes impossible the safeguarding of the New York industry by any price-fixing device.

The question here raised goes not merely to the validity of the section which directly pertains to milk produced in other states, but to the validity of the entire statute. The basic scheme and purpose of the statute is to protect the New York milk farmer against the competition of other states. The law, for that reason alone, is invalid

since it thereby discriminates against the products of other states. Moreover, New York cannot validly regulate the price of milk produced outside of New York, so that the whole scheme of the law necessarily falls. The New York farmer is injured instead of helped by the law so that it has no substantial relation whatever to the object sought to be attained. For this additional reason the statute is unconstitutional, since a law, to conform to due process, must "have a real and substantial relation to the object sought to be attained."

Nebbia v. *New York,* supra.
Liggett Co. v. *Baldridge,* 278 U. S. 105.
Adair v. *U. S.,* 208 U. S. 161.

POINT III.

Plaintiff did not waive its right to attack the constitutionality of the statute or of defendants' orders by applying for a license under the statute.

In the District Court defendants urged that plaintiff had waived its right to attack the statute or defendants' orders since it had applied for a license under the statute, and in connection with its application had agreed to obey the statute and orders made thereunder.

The facts do not sustain the claim of waiver.

A waiver is an intentional relinquishment of a right possessed by a party.

Bennecke v. *Ins. Co.,* 105 U. S. 355.
Rice v. *Fidelity & Deposit Co.,* 103 Fed. 427.
Balfour v. *Parkinson,* 84 Fed. 855.

Plaintiff did not first go into the milk business after the Milk Control Law went into effect. Had that been the case it might be possible to spell out an intent to waive the right of questioning the validity of the law

because of the application for a license under the statute in connection with the new venture. Plaintiff was in the milk business for many years prior to the statute (R. p. 15), and its valuable properties were particularly adapted to the carrying on of the milk business (R. p. 6).

The statute made it impossible for plaintiff to continue the use of its properties in its milk business without making application for a license, since it provides (Section 308):

> "No milk dealer, as defined in this article, shall buy milk from producers or others for sale within this state, or sell or distribute milk therein unless such dealer be duly licensed as provided in this section."

Plaintiff's application for a license under the circumstances evidenced no intent to waive its constitutional rights, for it was faced with the alternative of applying for a license as soon as the statute went into effect or abandoning its business.

The decisions of this Court indicate that there was no waiver by plaintiff. In *Abie State Bank* v. *Bryan*, 282 U. S. 765, the Court ruled that a bank which endeavored to do business under a state Bank Guarantee Act and which had proclaimed the advantages of the law did not waive its right to later attack it as unconstitutional.

In *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, the Court held that a foreign corporation by seeking a license to do business within the state does not waive its right to attack, as unconstitutional, state laws applicable to it.

In all events, plaintiff cannot be deemed to have waived its right to attack the constitutionality of defendants' orders, for when its application for a license was made these orders had not yet gone into effect (R. p.

29). An agreement, by an applicant for a license, to obey orders to be issued under a statute may properly be interpreted as an obligation to obey all orders validly made, but it cannot be deemed a promise to obey unconstitutional orders subsequently made, which are totally void and which in legal contemplation have no existence.

CONCLUSION.

The decree of the District Court should be reversed and the injunctive relief prayed for should be granted.

Respectfully submitted,

SAMUEL RUBINTON,
LEONARD ACKER,
Appellant's Counsel.

APPENDIX.

Laws of New York, 1933, Chapter 158.

Section 312.

§ 312. **Order fixing price of milk.** (a) The board shall ascertain by such investigations and proofs as the emergency permits, what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, having special regard to the health and welfare of children, and be most in the public interest. The board shall take into consideration all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer.

(b) The board after making such investigation shall fix by official order the minimum wholesale and retail prices and may fix by official order the maximum wholesale and retail prices to be charged for milk handled within the state for fluid consumption, and wheresoever produced, including the following classes:

1. By milk dealers to consumers.

2. By milk dealers to stores either for consumption on the premises or resale to consumers.

3. By stores to consumers except for consumption on the premises where sold.

4. When, pursuant to statute, regulations adopted thereunder, or ordinance, various grades of milk are specified, the board shall fix the minimum price and may fix the maximum price applicable to each in each of the foregoing classes. Orders fixing minimum and maximum prices may vary in different markets and shall designate the markets to which applicable.

(c) It is the intent of the legislature that the public emergency requires that the benefits of any increase of prices received by milk dealers by virtue of the minimum price provisions of this section shall be given to producers. To that end, if the board after investigation made either upon its own initiative or upon complaint of a representative group of producers supplying a particular dealer shall determine that such milk dealer purchasing milk from producers or from or through a cooperative corporation of producers organized under or subject to the provisions of chapter seventy-seven of the consolidated laws, in making such purchases has failed to give fair and reasonable effect to such intent, the board shall, upon due notice and after a hearing suspend or revoke the license of the milk dealer so offending and in addition thereto, a violation of this subdivision shall render such offending milk dealer subject to the provisions of section three hundred seven of this article.

(d) The board after making such investigation either on its own initiative or on complaint of a representative group of producers supplying a particular dealer or a particular market may fix by official order the minimum prices to be paid by milk dealers to producers and others for milk of the various forms included within the definition of milk as used in this article and its various grades and uses. The order of the board with respect to the minimum prices to be paid to the producers and others shall apply to the locality or zone in which the milk is produced, the market or markets in which the milk so produced is sold and may vary in different localities or markets according to varying uses and differing conditions. Each such order may classify such milk by forms, classes, grades or uses as the board may deem advisable and may specify the minimum prices therefor.

(e) After the board shall have fixed prices to be charged or paid for milk in any form included in the definition of

milk as used in this article whether by class, grade or use, it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price or prices as shall be applicable to the particular transaction, and no method or device shall be lawful whereby milk is bought or sold or offered to be bought or sold at a price less or more than such price, or prices as shall be applicable to the particular transaction, whether by any discount, or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise, except as provided in subdivision c of section three hundred and seventeen of this article.

(f) The board may upon its own motion or upon application from time to time alter, revise or amend an official order theretofore made with respect to the prices to be charged or paid for milk. After making such investigation and before making, revising or amending any order fixing the price to be charged or paid for milk, the board shall give a hearing thereon to all parties interested upon reasonable notice to such interested parties and to the public of such hearing in such newspaper or newspapers as in the judgment of the board shall afford sufficient notice and publicity. Such order of the board may be reviewed by certiorari order at the instance of any aggrieved person appearing of record at the hearing either in person or by personal representative and opposing the making of the order.

(g) It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exer-

cise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article on the board shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful.

Section 317 (c).

§ 317 (c) It shall not be unlawful for any milk dealer who, at the time this act shall take effect, is engaged in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants, to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed by the board for such sales to stores in such a city.

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IN THE

Supreme Court of the United States

October Term, 1934.
No. 27.

HEGEMAN FARMS CORPORATION,
Appellant,

against

CHARLES H. BALDWIN, and others,
Appellees.

BRIEF FOR APPELLEES.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 27.

HEGEMAN FARMS CORPORATION,
Appellant,

against

CHARLES H. BALDWIN, and others,
Appellees.

BRIEF FOR APPELLEES.

We present no jurisdictional question. In connection with the joint motion to advance (same case, number 988 of preceding term) we called attention to the fact that although the law under which the present case arose has expired, it was replaced by a similar statute which is now effective. The original issue has not become academic. Of the original three defendants, still named as appellees, two are non-essential parties now; Dr. Parran because he no longer has any part in administration or enforcement of the statute, and Mr. Fee because his official duties now are subordinated to those of the third appellee, Commissioner Baldwin.

Question.

Is the property of the appellant taken in violation of the Due Process Clause by a statute and orders fixing

the minimum price which it must pay producers for milk, but not fixing a minimum resale price equal to its total costs of operation?

How the Question Arises.

This is an application for an injunction brought by a domestic corporation of the State of New York against officials of that State. The suit is one regulated by U. S. Code Title 28, §380, (formerly Jud. Code, §266.) It was commenced in U. S. District Court, S. Dist. of N. Y., late in January, 1934, and on March 16th the District Court denied an injunction and dismissed the complaint. The opinion is reported at 6 F. Supp. 297, and is found in the Record, pages 54-57. By stipulation of the respective counsel the Court made findings of fact. (R. 57-59.) It also made brief conclusions of law. (R. 59-60.)

Facts.

The suit was instituted before *Nebbia v. New York*, 291 U. S. 502, was decided, and the first cause of action (R. 4-8) alleged in general terms the unconstitutionality of the New York milk control statute under the Fourteenth Amendment. Under point II of appellant's brief before this Court there is some argument against the constitutionality of the statute, but it seems to be related to the Commerce Clause. That matter will be discussed under point II of this brief, which answers the corresponding point in the appellant's brief.

The essentials of the second cause of action (R. 8-12) can be stated as follows: The appellant is a milk

dealer, buying milk from farmers in central New York State and reselling it to stores in New York City. By orders issued by the Milk Control Board the appellant was required to pay its producers about five cents a quart for milk, and the minimum price for resale to New York City stores was fixed at nine cents. The four cent differential was inadequate to cover freight and costs of operation. Appellant suffered a small loss; about four cents per hundred quarts. Competitive conditions made it impracticable for the appellant to charge more than the nine cent minimum. Its normal adjustment would have been to reduce the price paid producers, but there it was stopped by the order of the Board. Appellant asserted that the combined effect of the orders (or the effect of either operating upon the entire situation, including the other) was to take its property without due process of law.

The complaint alleged another matter incidentally to that major grievance. It appeared that the appellant had not actually paid its producers the price fixed by the Board, but had managed to pay them somewhat less over a period of months. Auditors from the Board exposed that fact, and the Board made orders revoking appellant's license as a milk dealer unless it paid its producers the unpaid balance of about $23,000. These orders were to have become effective on January 31, 1934, and it commenced this suit on January 30 by obtaining a show cause order and stay.

Although the complaint and affidavits filed by the appellant (R. 4-26, 47-53) and the answer and answering affidavits (R. 27-46) supply much more information, particularly technical material about the appellant's costs of operation, the foregoing summarizes

what is immediately relevant, and has the support in all essentials of the short findings of fact. (R. 57-59.)

Summary of Argument.

Point I. The orders were not unconstitutional. The resale price was only a minimum and nothing in the order fixing that price restrained the appellant from asking a greater price.

Point II. The statute was not unconstitutional in any matter of which the appellant can complain.

Point III. No claim is made that the appellant waived its right to attack the constitutionality of the orders merely by applying for a license under the statute. In some other respects it has waived and estopped itself.

POINT I.

The orders are not unconstitutional.. The resale price was only a minimum and nothing in the order fixing that price restrained the appellant from asking a greater price.

This is substantially the only ground covered by the opinion below, and we rely heavily upon its reasoning. We shall not repeat it in this brief, but merely add a few observations by way of supplement.

Under the 1933 milk control law, and again under the 1934 law, the administrative officials are authorized to fix resale prices at which milk dealers can sell. These may be minimum prices or maximum prices or both.

Thus far no maximum price has been established; competitive conditions have been thought to render that unnecessary.

At what point should the minimum price be established? Clearly it should not be fixed high enough to yield a fair return on the operations of the least efficient dealers. That is the highest tolerable point for fixing a maximum price.

Should the minimum be high enough to yield a fair return to dealers of average efficiency? There is something to be said for and against that conclusion. Perhaps the minimum now involved was that high. There is no finding that the appellant is of average efficiency, although there is some material in the moving papers which probably is intended to yield that inference. (R. 24-25; appellant's brief page 11.)

Fixing the minimum prcie at the point where only the most efficient dealers can earn a fair return would seem to be the course most in the public interest. The pressure of competition will then compel efficiency as a necessary condition for survival. We submit that there is no constitutional objection to a minimum price fixed so low. Indeed, we believe that the very nature of a minimum price is such that the failure to fix any minimum price whatever is no constitutional grievance.

It is part of public knowledge that in 1933 the Agricultural Adjustment Administration sponsored milk marketing agreements and licenses in all of the principal cities of the nation outside of New York and New Jersey. Each of those arrangements provided for

minimum prices to producers and minimum resale prices. About December, 1933 Secretary Wallace withdrew the minimum resale prices. In his opinion they were doing more harm than good. Since then the Federal administration has been compelling milk dealers in Boston, Philadelphia, Chicago and many other places to pay producers certain minimum prices, and has not supported them by any resale prices.

The same change in policy, only less open and avowed, has taken place under NRA. The main purpose was to increase payrolls, and that was to be accomplished by limiting hours of work and fixing minimum wages. At the same time, as it happened, the costs of many raw materials were being put up by processing taxes under AAA, and the costs of machinery and other supplies were being increased by parallel operations of NRA. Industry was for a while given strong support through code provisions tending to fix minimum resale prices. More recently the resale prices are being dropped, and industry left to meet its costs as best it may. The cotton textile industry, for instance, is said to operate at a loss.

We make no argument as to the wisdom or the unwisdom of these things. If that is reasonably open to doubt the question is not a justicable one. Probably the choice of course depends to some extent upon industry conditions and local conditions involved in each case. Even as to milk alone there are plenty of unsolved problems which can be solved only by administration. See an article in University of Cincinnati Law Review for May, 1934 (volume VIII, page 219), by Frank E. Horack, Jr. and Julius Cohen, entitled

"After the Nebbia case: the Administration of Price Regulation." The present case can be decided upon its own narrow facts.

It appears that the appellant, a dealer of undefined relative efficiency, selling milk to New York City stores at the minimum price of nine cents per quart, suffered a loss of about half a mill per quart. (R. 24; a loss of $.01605 per forty-quart can is about $.000401 per quart.) It was selling at the minimum price for sales for its class of business, which was *nine cents*. But it also appears that during the same period at least four of its competitors, including the three largest milk dealers in New York City, were making similar sales at *ten cents*. That was the minimum price applicable to them, and the difference between them and "unadvertised" dealers, such as the appellant, was owing to a peculiar statutory provision known as the "unadvertised differential." (R. 30-31.)

The constitutionality of that provision has been upheld in the case of *Borden's Farm Products Co. v. Baldwin*, 7 F. Supp. 352 (U. S. Dist. Ct., S. Dist. N. Y., June 6, 1934, opinion by Circ. Judge Learned Hand). That case will probably be before this Court in November and we shall not argue it now. We never have said much in support of the economic merit of the provision but it is not completely without a basis of reason. Appellant's brief devotes attention to it at pages 17-22. We wish to comment now only upon the difficulties which lie in the way of fixing a minimum resale price high enough to compel appellant to operate profitably, without at the same time compelling other dealers to operate at an outrageous profit. The "un-

advertised differential'' provision, the fact that there is considerable variance in the operating costs and efficiencies of various milk dealers, and that retail prices for milk ordinarily are expressed in cents per quart, without fractions, all contribute to those difficulties.

Appellant's proposition apparently is that the minimum price at which it could sell to New York City stores should have been set at 9.0401 cents per quart or more, to fit its operating costs. Let it be assumed that appellant is a dealer of average size and efficiency in the "unadvertised'' class, and hence that there is something typical about its operating costs. Giving due weight to the fact that retail prices do not use fractions of a cent, and that there was something accustomed and fair about allowing the storekeeper a cent a quart for his service, the price that must be fixed to satisfy appellant's demand was 10 cents. That would mean not only that the appellant and dealers similarly situated would be compelled to take an excessive profit, but that the "advertised'' dealers would be compelled to take another cent more than that excessive profit. Under those circumstances the minimum price would be elevated above the point justified for a maximum price.

Having regard to the purposes of a minimum resale price, and the difficulties of fixing one that will exactly meet all needs, we respectfully submit that the appellant has no ground to complain of the point at which this one was fixed. We submit also (but in this we go beyond the need of the present case) that the appellant would have no ground to complain if no mini-

mum resale price were fixed. The appellant's difficulties as to obtaining an adequate resale price are due, as was observed by the Court below, primarily to the force of competition.

Essentially appellant's grievance is against the order fixing a minimum price which it must pay producers for milk. But the power to fix such a minimum price can scarcely be questioned since the decision of *Nebbia v. New York*, 291 U. S. 502. The attack must be upon the reasonableness of the minimum price fixed. As we shall show below, under Point III, there are good reasons why appellant should not be heard now and in this proceeding to complain about that. Ignoring those for the present, appellant does not support such an attack otherwise than by the inference derived from its own failure to make a profit. We submit that a constitutional case is not made out so easily. Why does appellant infer that its loss is a direct result of only one factor in its costs? Apparently because it is a novelty to have that cost fixed. Appellant does not allege its labor costs or taxes or freight rates as a constitutional grievance. In the last analysis appellant's complaint is that for many years the full incidence of every business trouble in the milk industry has been put upon and borne by the dairy farmer, and he has borne those troubles so many years that now it is a constitutional right of the milk dealer to have him continue to bear them.

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The Statute was not unconstitutional in any matter of which the appellant can complain.

Point II of appellant's brief revolves around section 312 (g) of the 1933 milk control law, which forbids

the sale within New York State of milk produced without the State unless the out-of-the-state producers are paid the prices fixed for payment to New York State producers equally distant from market, etc. This provision is qualified by some legislative protestations that there is no intention to interfere with interstate commerce, and that the provision shall be applicable only after the interstate milk, "shall have come to rest within the state", and its handling "becomes a subject of regulation by the state in the exercise of its police powers". What that language means in the light of the Commerce Clause probably will come before the Court within two or three months. In the case of *G. A. F. Seelig, Inc. v. Baldwin,* 7 F. Supp .... (U. S. Dist. Ct., S. Dist. N. Y., Aug. 2, 1934, opinion by Circ. Judge Learned Hand) it was held that the provision was inapplicable to milk in the original cans used for shipment, but was applicable to bottled milk, and an appeal has been taken to this Court.

There is no need at present to discuss the question. Appellant can claim no direct grievance, because it buys milk only within New York State. It should not complain about the grievances of others. *Herbring v. Lee,* 280 U. S. III. Its bill of complaint (R. 4-12 does not even refer to what is now asserted as a grievance. Neither does its assignment of errors (R. 61, 59-60). It cannot make out a constitutional grievance indirectly, although 30 per cent of the milk consumed in New York City comes from without the State and hence (appellant says) is unregulated as to its price at the point of origin. Appellant cannot be harmed by this alleged good fortune of some of its competi-

tors, because all must sell within New York State at the same price. Even if appellant could show that it is harmed we doubt if it would be held a violation of Due Process for New York State to regulate the 70 per cent of milk within its jurisdiction and leave unregulated because it must the 30 per cent which is of extra-state origin.

We respectfully submit that the very interesting questions involved in the *Seelig* case should wait for argument and decision until they are brought directly before the Court. They are not properly any part of this appellant's case.

POINT III.

No claim is made that the appellant waived its right to attack the constitutionality of the orders merely by applying for a license under the statute. In some other respects it has waived and estopped itself.

The nature of our point below, which is referred to in appellant's present brief at page 43, will be indicated more accurately by the following paragraph which introduced it:

> "It is arguable that plaintiff, having sought a license under this statute and having enjoyed the benefit of having its competitors rstrained under it, is estopped to question its constitutionality [citing cases, including United Fuel Gas Co. v. Railroad Commission, 278 U. S. 300, 307-308]. At least it is clear that the plaintiff should not be welcomed in a court of equity when it has availed itself of benefits under the statute, promised by its application to obey the orders of the Board,

> been caught paying less than the minimum prices to producers fixed by such an order, and now interposes this suit to avoid making the payment to which it has no defense except constitutional ones."

So far as appellant's case now is based upon the proposition that one or the other or both prices fixed by orders of the Board is unfair and unreasonable, we are clear that it was not waived merely by applying for a license or even by promising in the application to abide by the orders to be made (R. 29, "B"). Nobody could know then how reasonable or otherwise the orders would be. The most we might claim is that appellant thereby waived the right to complain about parts of the statute having an obvious relation to its own business. Compare, the procedure of *Borden's* in challenging the "unadvertised differential" provision before applying for a license, and of *Seelig* in challenging the interstate provision before applying for a license. In the present case we have no need to make that claim and shall not argue it.

The milk control law, section 312 (f), provided that the Board could make a price order only after a public hearing upon reasonable notice. Then it provided as follows:

> "Such an order of the board may be reviewed by certiorari order at the instance of any aggrieved person appearing of record at the hearing either in person or by personal representative and opposing the making of the order."

Appellant does not assert that it pursued even the administrative part of the remedy, and in opposition it is asserted that the appellant has done nothing along that line (R. 30, "C"). The most recent order fixing

the minimum price to producers had been in effect from July 21, 1933, or more than six months when this suit was started. It does not appear that the appellant ever had protested about it. To and including September, 1933, it filed reports which purported to show that it paid its producers the established price, but audits revealed that it was paying less, and it was ordered to make up the difference (R. 33-34, "G"; 6-7, 14). Then it was, and not until then, that the appellant claimed refuge in a Federal court of equity and asserted constitutional authority for what it had done by stealth.

We respectfully submit that the appellant should have pursued its administrative remedies provided by statute before seeking the aid of a federal court of equity (*Gorham Mfg. Co. v. Tax Comm.*, 266 U. S. 265; *Chicago, etc. Co. v. Risty*, 276 U. S. 567), and that it should not have pretended to be obeying the orders while really disobeying them; its conduct should disentitle it to relief on constitutional grounds in a court of equity.

FINALLY.

It is respectfully submitted that the decree below should be affirmed, or the appeal dismissed.

JOHN J. BENNETT, JR.,
Attorney General of the State of New York,

HENRY EPSTEIN,
Solicitor General,

HENRY S. MANLEY,
Counsel to the Department of Agriculture and Markets,

Solicitors for Appellees.

FILE COPY

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1934.

No. 27.

HEGEMAN FARMS CORPORATION,
Appellant,

against

CHARLES H. BALDWIN, and others,
Appellees.

BRIEF FOR APPELLEES.

JOHN J. BENNETT, JR.,
Attorney General of the State of New York,

HENRY EPSTEIN,
Solicitor General,

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Counsel to the Department of Agriculture and Markets,

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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BRIEF FOR APPELLEES.

We present no jurisdictional question. In connection with the joint motion to advance (same case, number 988 of preceding term) we called attention to the fact that although the law under which the present case arose has expired, it was replaced by a similar statute which is now effective. The original issue has not become academic. Of the original three defendants, still named as appellees, two are non-essential parties now; Dr. Parran because he no longer has any part in administration or enforcement of the statute, and Mr. Fee because his official duties now are subordinated to those of the third appellee, Commissioner Baldwin.

Question.

Is the property of the appellant taken in violation of the Due Process Clause by a statute and orders fixing

the minimum price which it must pay producers for milk, but not fixing a minimum resale price equal to its total costs of operation?

How the Question Arises.

This is an application for an injunction brought by a domestic corporation of the State of New York against officials of that State. The suit is one regulated by U. S. Code Title 28, §380, (formerly Jud. Code, §266). It was commenced in U. S. District Court, S. Dist. of N. Y., late in January, 1934, and on March 16th the District Court denied an injunction and dismissed the complaint. The opinion is reported at 6 F. Supp. 297, and is found in the Record, pages 54-57. By stipulation of the respective counsel the Court made findings of fact. (R. 57-59.) It also made brief conclusions of law. (R. 59-60.)

Facts.

The suit was instituted before *Nebbia v. New York*, 291 U. S. 502, was decided, and the first cause of action (R. 4-8) alleged in general terms the unconstitutionality of the New York milk control statute under the Fourteenth Amendment. Under point II of appellant's brief before this Court there is some argument against the constitutionality of the statute, but it seems to be related to the Commerce Clause. That matter will be discussed under point II of this brief, which answers the corresponding point in the appellant's brief.

The essentials of the second cause of action (R. 8-12) can be stated as follows: The appellant is a milk

dealer, buying milk from farmers in central New York State and reselling it to stores in New York City. By orders issued by the Milk Control Board the appellant was required to pay its producers about five cents a quart for milk, and the minimum price for resale to New York City stores was fixed at nine cents. The four cent difference was inadequate to cover freight and costs of operation. Appellant suffered a small loss; about four cents per hundred quarts. Competitive conditions made it impracticable for the appellant to charge more than the nine cent minimum. Its normal adjustment would have been to reduce the price paid producers, but there it was stopped by the order of the Board. Appellant asserted that the combined effect of the orders (or the effect of either operating upon the entire situation, including the other) was to take its property without due process of law.

The complaint alleged another matter incidentally to that major grievance. It appeared that the appellant had not actually paid its producers the price fixed by the Board, but had managed to pay them somewhat less over a period of months. Auditors from the Board exposed that fact, and the Board made orders revoking appellant's license as a milk dealer unless it paid its producers the unpaid balance of about $23,000. These orders were to have become effective on January 31, 1934, and it commenced this suit on January 30 by obtaining a show cause order and stay.

Although the complaint and affidavits filed by the appellant (R. 4-26, 47-53) and the answer and answering affidavits (R. 27-46) supply much more information, particularly technical material about the appellant's costs of operation, the foregoing summarizes

what is immediately relevant, and has the support in all essentials of the short findings of fact. (R. 57-59.)

Summary of Argument.

Point I. The orders were not unconstitutional. The resale price was only a minimum and nothing in the order fixing that price restrained the appellant from asking a greater price.

Point II. The statute was not unconstitutional in any matter of which the appellant can complain.

Point III. No claim is made that the appellant waived its right to attack the constitutionality of the orders merely by applying for a license under the statute. In some other respects it has waived and estopped itself.

POINT I.

The orders are not unconstitutional. The resale price was only a minimum and nothing in the order fixing that price restrained the appellant from asking a greater price.

This is substantially the only ground covered by the opinion below, and we rely heavily upon its reasoning. We shall not repeat it in this brief, but merely add a few observations by way of supplement.

Under the 1933 milk control law, and again under the 1934 law, the administrative officials are authorized to fix resale prices at which milk dealers can sell. These may be minimum prices or maximum prices or both.

Thus far no maximum price has been established; competitive conditions have been thought to render that unnecessary.

At what point should the minimum price be established? Clearly it should not be fixed high enough to yield a fair return on the operations of the least efficient dealers. That is the highest tolerable point for fixing a maximum price.

Should the minimum be high enough to yield a fair return to dealers of average efficiency? There is something to be said for and against that conclusion. Perhaps the minimum now involved was that high. There is no finding that the appellant is of average efficiency, although there is some material in the moving papers which probably is intended to yield that inference. (R. 24-25; appellant's brief page 11.)

Fixing the minimum price at the point where only the most efficient dealers can earn a fair return would seem to be the course most in the public interest. The pressure of competition will then compel efficiency as a necessary condition for survival. We submit that there is no constitutional objection to a minimum price fixed so low. Indeed, we believe that the very nature of a minimum price is such that the failure to fix any minimum price whatever is no constitutional grievance.

It is part of public knowledge that in 1933 the Agricultural Adjustment Administration sponsored milk marketing agreements and licenses in all of the principal cities of the nation outside of New York and New Jersey. Each of those arrangements provided for

minimum prices to producers and minimum resale prices. About December, 1933 Secretary Wallace withdrew the minimum resale prices. In his opinion they were doing more harm than good. Since then the Federal administration has been compelling milk dealers in Boston, Philadelphia, Chicago and many other places to pay producers certain minimum prices, and has not supported them by any resale prices.

The same change in policy, only less open and avowed, has taken place under NRA. The main purpose was to increase payrolls, and that was to be accomplished by limiting hours of work and fixing minimum wages. At the same time, as it happened, the costs of many raw materials were being put up by processing taxes under AAA, and the costs of machinery and other supplies were being increased by parallel operations of NRA. Industry was for a while given strong support through code provisions tending to fix minimum resale prices. More recently the resale prices are being dropped, and industry left to meet its costs as best it may. The cotton textile industry, for instance, is said to operate at a loss.

We make no argument as to the wisdom or the unwisdom of these things. If that is reasonably open to doubt the question is not a justiciable one. Probably the choice of course depends to some extent upon industry conditions and local conditions involved in each case. Even as to milk alone there are plenty of unsolved problems which can be solved only by administration. See an article in University of Cincinnati Law Review for May, 1934 (volume VIII, page 219), by Frank E. Horack, Jr. and Julius Cohen, entitled

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It appears that the appellant, a dealer of undefined relative efficiency, selling milk to New York City stores at the minimum price of nine cents per quart, suffered a loss of about half a mill per quart. (R. 24; a loss of $.01605 per forty-quart can is about $.000401 per quart.) It was selling at the minimum price for sales for its class of business, which was *nine cents*. But it also appears that during the same period at least four of its competitors, including the three largest milk dealers in New York City, were making similar sales at *ten cents*. That was the minimum price applicable to them, and the difference between them and "unadvertised" dealers, such as the appellant, was owing to a peculiar statutory provision known as the "unadvertised differential." (R. 30-31.)

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> "It is arguable that plaintiff, having sought a license under this statute and having enjoyed the benefit of having its competitors restrained under it, is estopped to question its constitutionality [citing cases, including United Fuel Gas Co. v. Railroad Commission, 278 U. S. 300, 307-308]. At least it is clear that the plaintiff should not be welcomed in a court of equity when it has availed itself of benefits under the statute, promised by its application to obey the orders of the Board, been caught paying less than the minimum prices to producers fixed by such an order, and now in-

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FINALLY.

It is respectfully submitted that the decree below should be affirmed, or the appeal dismissed.

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HENRY EPSTEIN,
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Solicitors for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 27.—October Term, 1934.

Hegeman Farms Corporation, Appellant, *vs.* Charles H. Baldwin and others, as Members of the Milk Control Board of the State of New York, Appellees. } Appeal from a decree of the District Court of the United States for the Southern District of New York.

[November 5, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

In this suit for an injunction, the appellant, a wholesale milk dealer, contests the validity under the Fourteenth Amendment of orders of the New York Milk Control Board limiting the price of milk. A District Court of three judges, organized in accordance with section 266 of the Judicial Code (28 U. S. C. § 380), has denied a motion by the complainant for an interlocutory injunction, and granted a motion by the defendants to dismiss the bill. 6 F. Supp. 297. No testimony was taken, but for the purposes of the two motions certain facts were stipulated and embodied in findings. Nothing important is there added to what is stated in the complaint. From the final decree there has been an appeal to this court. 28 U. S. C. § 380.

The attempt is made in the bill to state two causes of action, pleaded in separate counts. The first cause of action assails the Milk Control Act (N. Y. Laws 1933, c. 158) as a whole, and was dismissed on the authority of *Nebbia* v. *New York*, 291 U. S. 502. It has not been pressed in this Court, and must be treated as abandoned.[1] The second cause of action, the only one contested here, assumes provisionally the validity of the statute and assails the orders made under it in their application to appellant. On that head the bill recounts the orders of the Board prescribing a minimum selling price to be charged by dealers to their customers and also a minimum buying price to be paid by dealers to producers. The milk sold by the appellant is known as Grade B. At the time of the trial the minimum wholesale price for milk of that

[1]The Act of 1933 has been amended and continued by Laws of 1934, Chap. 126.

grade in the City of New York was nine cents per quart, except that dealers such as the appellant marketing their product without a well established trade name might sell one cent a quart below the minimum for others. By the same orders the minimum price for fluid milk to be paid to producers was fixed at five cents a quart. A separate schedule of the orders gives the rates for fluid cream. The complainant's license was revoked by the Board after notice and a hearing because of underpayments to producers. The license was, however, to be reinstated upon payment of the difference ($23,000). The bill prays a decree cancelling the revocation with exemption for the future.

The question on this appeal is whether the allegations of the bill, admitted in the stipulation, but not substantially enlarged, make out a cause of action. For an understanding of the complainant's position both in its economic and in its legal aspects, the fact is of critical importance that there has been no attempt by the Board to fix a maximum price in respect of any of the transactions subject to its regulatory power. What is fixed is a minimum only. None the less, the competition among dealers is so keen that in practice the legal minimum is the maximum that the appellant is able to charge. The "spread" between what must be paid to the producers and what can be collected from the customers is so small that it "is insufficient in amount to afford plaintiff a fair return on the present fair value of the properties devoted by it to its milk business less depreciation." This the bill and findings state. They tell us also that the properties have a value of more than $450,000. They do not tell us whether the appellant ran its business with reasonable efficiency when compared with others in its calling. They do not even tell us whether it was earning a fair return on its investment before the orders were adopted. The omission is the more significant because, according to official records, the "spread" has been increased, instead of being diminished, through the operation of control. Report of the Milk Control Board, March 1934, pp. 17, 18.[2] For all that appears upon this record, a change of the mini-

[2] "If allowances are made for the additional milk which, because of the tightening-up of the classification for Class 1 milk occurring on February 16, 1934 must be included in Class 1, the milk dealers' spread at this time is approximately 0.12 cents per quart greater than it was just before the Board was created."

This statement in the report is followed by schedules which contain supporting data.

mum prices would avail the appellant nothing if a corresponding increase or reduction were allowed to its competitors. It might still be driven to the wall without the aid of a differential that would neutralize inequalities of capacity or power. If different minima would help, the pleading leaves us in the dark as to what those minima should be. There is no statement that a different selling price could be fixed with fairness to consumers, or a different purchasing price with fairness to producers. The appellant's grievance amounts to this, that it is operating at a loss, though other dealers more efficient or economical or better known to the public may be operating at a profit.

A bill of complaint so uncertain in aim and so meagre in particulars falls short of the standard of candor and precision set up by our decisions. *Public Service Comm. of Montana* v. *Great Northern Utilities Co.*, 289 U. S. 130, 136; *Aetna Ins. Co.* v. *Hyde*, 275 U. S. 440, 447. True the appellant is losing money under the orders now in force. For anything shown in the bill it was losing money before. For anything there shown other dealers at the same prices may now be earning profits; at all events they are content, or they would be led by self interest to raise the present level. We are unable to infer from these fragmentary data that there has been anything perverse or arbitrary in the action of the Board. To make the selling level higher might be unfair to the consumers; to make the purchasing level lower might bring ruin to producers. The appellant would have us say that minimum prices must be changed whenever a particular dealer can show that the effect of the schedule in its application to himself is to deprive him of a profit. This is not enough to subject administrative rulings to revision by the courts. If the designation of a minimum price is within the scope of the police power, expenses or losses made necessary thereby must be borne as an incident, unless the order goes so far beyond the needs of the occasion as to be turned into an act of tyranny. Nothing of the kind is charged. The Fourteenth Amendment does not protect a business against the hazards of competition. *Public Service Comm. of Montana* v. *Great Northern Utilities Co., supra,* at p. 135. It is from hazards of that order, and not from restraints of law capriciously imposed, that the appellant seeks relief. The refuge from its ills is not in constitutional immunities.

Much is made of a supposed analogy between the plight in which the appellant finds itself and that of public utilities subjected to maximum rates that do not yield a fair return. But the analogy, when scrutinized, is seen to be unreal. A public utility in such circumstances has no outlet of escape. If it is running its business with reasonable economy, it must break the law or bleed to death. But that is not the alternative offered where the law prescribes a minimum. An outlet is then available to the regulated business, an outlet that presumably will be utilized whenever use becomes expedient. If the price is not raised, the reason must be that efficient operators find that they can get along without a change. Either that must be so, or else, as was pointed out in the opinion below, the industry will perish. The bill does not suggest that such a catastrophe is imminent. True, of course, it is that the weaker members of the group (the marginal operators or even others above the margin) may find themselves unable to keep pace with the stronger, but it is their comparative inefficiency, not tyrannical compulsion, that makes them laggards in the race. Whether a wise statecraft will favor or condemn this exaltation of the strong is a matter of legislative policy with which courts are not concerned. To pass judgment on it, there is need that the field of vision be expanded to take in all the contestants in the race for economic welfare, and not some of them only. The small dealer may suffer, but the small producer may be helped, and an industry vital to the state thus rescued from extinction. Such, at any rate, is the theory that animates the statute, if we look to the official declaration of the purpose of its framers. *Nebbia* v. *New York, supra,* pp. 515, 516. The question is not for us whether the workings of the law have verified the theory or disproved it. At least, a law so animated is rescued from the reproach of favoritism for the powerful to the prejudice of the lowly. If the orders made thereunder are not arbitrary fiats, the courts will stand aloof.

The statute (N. Y. Laws 1933, c. 158, § 312 [d] [f]) contains provisions whereby a dealer dissatisfied with any administrative order may be heard in opposition, or may apply to the Board afterwards to modify its ruling. This is an administrative remedy which in the one form or the other the appellant should have utilized before resorting to a suit. *P. F. Petersen Baking Co.* v. *Bryan,* 290 U. S. 570, 575. There is no statement that it did so.

The decree should be affirmed.

Mr. Justice SUTHERLAND concurs in the result.